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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1960
No. 155

MICHIGAN NATIONAL BANK, a banking association organized under the laws of the United States,

Appellant,

NATIONAL BANK OF WYANDOTTE, THE FIRST NATIONAL BANK (THREE RIVERS, MICHIGAN), COMMERCIAL NATIONAL BANK OF IRON MOUNTAIN, THE NATIONAL BANK OF JACKSON, and THE FIRST NATIONAL BANK AND TRUST COMPANY OF KALAMAZOO, banking associations organized under the laws of the United States,

Intervening Plaintiffs,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN, and LOUIS M. NIMS, STATE COMMISSIONER OF REVENUE,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

OBJECTIONS OF THE STATE OF MICHIGAN TO MOTION OF THE FRANKLIN NATIONAL BANK OF LONG ISLAND FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE

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SPEAKER-HINES AND THOMAS, INC., LANSING, MICH — 1960

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Pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, appellees move that the Motion of The Franklin National Bank of Long Island for Leave to File a Brief as Amicus Curiae and Brief Amicus Curiae

[hereinafter referred to as the "Motion"] be denied for the following reasons, to-wit:

1. As stated on page 27 of appellees' brief filed in this cause, the above-captioned matter involves:

> "Is Act 9, Michigan Public Acts of 1953, [hereinafter referred to as Act 9][1] which imposed for the year 1952 a tax of 5½ mills on national bank shares, invalid under § 5219[2] because the Michigan legislature has not treated a savings share account of a savings and loan association as being equivalent to a share of national bank stock (measured by capital account), when the national bank loans a portion of its deposit money on residential properties and the savings and loan associations employ their mutual share account moneys for the same general purpose?"

2. The New York case referred to in the Motion[3] could not possibly involve any issues in common with this cause, since it is not a tax case and in no way directly or indirectly, involves interpretation or application of the restrictions of § 5219 to a state's power to tax national bank shares.

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[1]
Michigan Compiled Laws § 205.132a; Michigan Statutes Annotated '59 Cumulative Supplement (Henderson) § 7.556(2a).

[2]
12 U.S.C., Section 548; 13 Stat. 111, as amended by Stat. 34; 42 Stat. 1499; and 44 Stat. 223.

[3]
The Franklin National Bank of Long Island v. *G. Russell Clark as Superintendent of Banks of the State of New York and others* (New York County Clerk's Index No. 9734/1960)

3. The nature of the interest, if any, of The Franklin National Bank of Long Island is remote, indirect, and not germane; thus, their involvement in this case, as amicus curiae, would burden the State of Michigan and this Court with extraneous and unnecessary argument and would tend to confuse and distort the legal issue pending between the parties to this cause, without any foreseeable benefit.

4. Any involvement in this cause of The Franklin National Bank of Long Island, as amicus curiae, will undoubtedly require the additional involvement of the Attorney General of New York, as amicus curiae, and/or other counsel for the parties defendants, thus tending to convert this cause into a review by this Court — prior to final adjudication in the New York courts — of the issues sought to be adjudicated there.

5. An examination of the Jurisdictional Statement, Motion to Dismiss or to Affirm, and the Brief of Appellant Opposing Appellees' Motion to Dismiss or to Affirm, and the Brief of Appellant in this cause, clearly demonstrates that the parties are competent to and have adequately presented, to the extent material in this cause, the legal arguments referred to on page 3 of the Motion, and for this reason The Franklin National Bank of Long Island has not brought itself within the requirements of paragraphs enumerated 3 of Rule 42 of the Revised Rules of this Court.

The appellees in this cause have withheld their consent to the filing of a brief as amicus curiae of The Franklin National Bank of Long Island for the above reasons.

Wherefore, it is respectfully requested that this Court deny the Motion of The Franklin National Bank of Long

Island for Leave to File a Brief as Amicus Curiae and Brief as Amicus Curiae in this cause.

Respectfully submitted,

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Samuel J. Torina
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CERTIFICATE OF SERVICE

I hereby certify that copies of the aforesaid Objections to Motion of The Franklin National Bank of Long Island to File a Brief as Amicus Curiae and Brief as Amicus Curiae have been served, by depositing the same in the United States mails, with first class air mail postage prepaid, upon the following counsel:

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Attorney for The Franklin National Bank of Long Island

On this ..... day of December, A.D., 1960.

.....

William D. Dexter
Assistant Attorney General

APPELLEE'S BRIEF

FILE COPY

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

APPELLEES' BRIEF

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SPEAKERS-HINES & THOMAS, INC., LANSING, MICH., 1960

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APPELLEES' BRIEF[*]

STATUTES INVOLVED

Appellant takes too narrow a view of the statutes involved. It ignores the federal statutes pertaining to the

[*] Unless otherwise indicated, the use of the present tense refers to the calendar year 1952, numbers in parentheses preceded by "R." refer to pages in the printed record, and numbers preceded by "Br." refer to pages of the appellant's brief.

creation, regulation, taxation and protection of federal and state savings and loan associations.[1] It ignores the statutory pattern adopted by the State of Michigan for the incorporation, regulation and control of Michigan savings and loan associations and the rationale of the Michigan tax structure pertaining to such associations, banking and trust institutions and all other financial insfitutions. It ignores congressional treatment of other alleged blocks of moneyed capital that could be urged to be in "substantial competition" with the appellant in the same sense that it alleges that savings and loan association savings share accounts are in such competition.

Below, appellees shall refer in concise form to relevant statutory provisions.

A. THE MICHIGAN TAX SYSTEM AS RELATED TO FINANCIAL BUSINESS

(1) The Taxation of Intangible Property in Michigan

Prior to the enactment of the Intangibles Tax Act in 1939, bank shares were taxed pursuant to a statutory formula under the ad valorem tax law, which covered all real and personal property in Michigan.[2]

---

[1]

Federal statutes permit chartering of only those institutions known as "savings and loan associations." Michigan law permits organizing of both savings and loan and building and loan associations. Their functions are similar and both entities are herein termed "savings and loan associations."

[2]

Mich. Pub. Acts 1893, No. 206; Mich. Comp. Laws 1948, § 211.8(8); Mich. Stat. Ann. (Henderson) § 7.8(8).

By the enactment of the Intangibles Tax Act in 1939,[3] bank shares were taxed in a manner similar to the shares of other financial institutions and corporations — at a rate of 6 per cent of the dividend income but not less than 1/10 of one per cent or more than 3/10 of one per cent per par, face or contributed value of the share.[4]

Subsequent to the original enactment, amendments changed the rate as to bank shares, provided for the collection of the tax at the source.[5]

Section 3[6] of the statute as originally enacted exempted

"• • •

"(11) Intangible personal property belonging to banks, building and loan associations, savings and loan associations and trust companies doing business in this state under whatever authority organized;

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[3] Mich. Pub. Acts 1939, No. 301; Mich. Comp. Laws 1948, § 205.131, et seq.; Mich. Stat. Ann. (Henderson) § 7.556(1), et seq.

[4] The appellant paid the tax for the period in question, in the amount of $18,5[illegible], without protest, measured by 3½ per cent of the dividends paid to its stockholders for the period (Pl. Ex. 1, R. 527a,

[5] Mich. Pub. Acts 1939, No. 301, as amended by Mich. Pub. Acts 1941, No. 233, Mich. Pub. Acts 1945, No. 165, Mich. Pub. Acts 1947, No. 175, Mich. Pub. Acts 1949, No. 308, and Mich. Pub. Acts 1951, No. 76 and No. 246. For convenient reference, applicable provisions of this statute as in effect for the period in question are set out in Addendum "B" to this brief.

[6] Mich. Comp. Laws 1948, § 205.133; Mich. Stat. Ann. (Henderson) 7.556(3). [Subsection (15) does not appear in either the current Mich. Comp. Laws or Mich. Stat. Ann.]

• • •

"(12a) Intangible personal property belonging to credit unions doing business in this state under whatever authority organized;

• • •

"(15) Time, savings and demand deposits in banks up to the amount of $3,000.00 for each taxpayer."

In 1945, by Act 165, the imposition section of the intangibles tax statute[7] was amended to impose "on shares of stock in building and loan or savings and loan associations" a tax of 1/25 of one per cent of the paid-in value of such shares, and on "moneys on hand or in transit or on deposit in a bank" a tax of 1/25 of one per cent.

As amended by Act 182 of the Michigan Public Acts of 1952, the Michigan Intangibles Tax Act imposed a tax measured by 3½ per cent of the income on income-producing intangible property such as bank shares and, in addition, imposed a 4 mill tax on the shares of national banking associations measured by the capital account (paid-in capital, surplus and undivided profits). No 4 mill tax was collected under the provisions of the amendatory language of Act 182 because the legislature was advised that to tax both the income from national bank shares and the shares violated § 5219[8] of the Revised Statutes of the United

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[7]

Mich. Comp. Laws 1948, § 205.132; Mich. Stat. Ann (Henderson) § 7.556(2).

[8]

Mar. 4, 1923, ch. 267, 42 Stat. 1499; Mar. 25, 1926, ch. 88, 44 Stat. 223; 12 U.S.C. § 548.

States (hereinafter referred to as § 5219), (quoted by the appellant in Appendix A), since the states are permitted to use only one method there permitted to the exclusion of other methods.

At the time the Legislature imposed the share tax of 4 mills on banks and trust companies by Act 182 of the Michigan Public Acts of 1952, it exempted, under Act 85 of the Michigan Public Acts of 1921,[9] state banks and trust companies from payment of the annual franchise privilege fee.

The purpose of the 4 mill share tax on banks and trust companies under the Intangibles Tax Act was to bring the tax on national bank shares in line with the tax on state banks and other financial institutions, which in 1952 were paying a 4 mill tax on their paid-up capital and surplus under the general corporate privilege fee statute of Michigan.

Before the 4 mill intangibles tax on bank and trust company shares became due and payable, the Legislature in 1953 adopted Act 9, effective March 25 of that year, which is the statute in question here. Act 9 provided that for the calendar year 1952 and thereafter, the *exclusive* tax on all shares of banks and trust companies should be 5½ mills per dollar, measured by the capital, surplus and undivided profits represented by each share of the common stock for such year.[10] The legislature under the Intangibles Tax Act

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[9]

Mich. Pub. Acts 1921, No. 85, as amended by Mich. Pub. Acts 1952, No. 183; Mich. Comp. Laws § 450.301, et seq.; Mich. Stat. Ann. (Henderson) § 21.201, et seq.

[10]

Mich. Pub. Acts 1953, No. 9 is set forth verbatim in Appendix "B" to appellant's brief.

treated bank deposits, cash and savings and loan associations savings share accounts as equivalent. This species of intangible property was taxed at 1/25 of one per cent.

(2) Other Taxes Imposed in Michigan on Financial Businesses

In addition to the 1/25 of one per cent intangibles tax on savings and loan associations share accounts in 1952, federal and state savings and loan associations were subject to an initial fee on authorized capital at the time of organization, admission or change of capital structure. Foreign corporations doing business in Michigan were also subject to a tax on their authorized capital stock, determined in accordance with a statutory apportionment formula.[11] State associations in 1952 also paid an annual corporate privilege fee of ¼ mill on each dollar of paid-in capital and legal reserve, with a nominal filing fee.[12] Through a series of amendments, in 1954 the federal associations were then subject to the same fees and taxes as were state and foreign corporations in 1952.[13] Building and loan asso-

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[11]

Mich. Pub. Acts 1921, No. 85, as amended by Mich. Pub. Acts 1952, No. 183; Mich. Comp. Laws § 450.303; Mich. Stat. Ann. (Henderson) § 21.203. [As so amended, this section does not appear in either the current Mich. Comp. Laws or Mich. Stat. Ann.] For convenient reference, applicable provisions of the general corporation fee statute as in effect for the period in question are set out in Addendum "B" to this brief.

[12]

Domestic and foreign savings and loan associations have always been subject to the annual corporate privilege fee. Act 85, Mich. Pub. Acts 1921, in § 4-a [Mich. Comp. Laws § 450.304a; Mich. Stat. Ann. (Henderson) § 21.206], required an annual privilege fee from such associations of 1 mill upon each dollar of paid-in capital and reserve, but not in excess of $2,000.

ciations doing business in Michigan further were required to pay an annual examination fee of 1/100 of 1 per cent of the gross amount of assets, subject to a minimum fee of $50.[14]

Savings share certificates and mortgages held by building and loan associations were subject to taxation from 1887 to 1889 under the general tax law of 1885, and have been exempt since 1889 by virtue of Act 124, Mich. Pub. Acts 1889, which added § 17 to Act 50, Mich. Pub. Acts 1887.

All financial businesses (individuals, partnerships, corporations) holding tangible personal property and real prop-

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[13]

Mich. Pub. Acts 1952, No. 183; Mich. Comp. Laws § 450.303, et seq.; Mich. Stat. Ann. (Henderson) § 21.203, et seq.

By Mich. Pub. Acts 1954, No. 144 [Mich. Comp. Laws (Mason's 1956 Supp.) § 450.303, et seq.; Mich. Stat. Ann. (Henderson) § 21.203, et seq.], the legislature repealed the franchise and privilege taxes imposed on foreign and domestic building and loan associations.

By Mich. Pub. Acts 1954, No. 157 [Mich. Comp. Laws (Mason's 1956 Supp.) § 489.29; Mich. Stat. Ann. (Henderson) § 23.572], the Legislature imposed a privilege tax on domestic building and loan associations equal to ¼ mill on the amount of capital and reserves, and a franchise tax equal to 1/10 mill on authorized capital.

By Mich. Pub. Acts 1954, No. 158 [Mich. Comp. Laws (Mason's 1956 Supp.) § 489.201, et seq.; Mich. Stat. Ann. (Henderson) § 23.591, et seq.], foreign and state building and loan associations were subject to a privilege tax equal to ¼ mill on capital and reserves and a franchise tax equal to 1/10 mill on paid-in capital.

By Mich. Pub. Acts 1954, No. 180 [Mich. Comp. Laws (Mason's 1956 Supp.) § 489.371, et seq.; Mich. Stat. Ann. (Henderson) § 23.589(1), et seq.], federal savings and loan associations were subject to a privilege tax equal to ¼ mill on capital and reserves.

[14]

Mich. Pub. Acts 1901, No. 17; Mich. Comp. Laws 1948, § 489.29; Mich. Stat. Ann. (Henderson) § 23.572.

erty in Michigan pay uniform ad valorem taxes[15] (except banks and trust companies as to personalty)[16], the amount of which is determined by the local rate.

Domestic insurance companies are subject to an annual tax of 5 mills, measured by capital, surplus and unassigned funds. The maximum tax is $50,000.[17] Foreign insurance companies pay premium taxes ranging from 2 per cent to 3 per cent on their gross premiums received from Michigan sources.[18]

Federal and domestic credit unions are exempt from all taxation except real and tangible personal property taxes.

All financial businesses other than national banks are subject to miscellaneous state tax measures, including use tax on their purchases and sales tax on their sales, being of the nature that cannot be imposed upon national banking associations under the provisions of § 5219. In addition, all such corporate financial businesses except banks, trust companies and savings and loan associations

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[15]

Mich. Pub. Acts 1893, No. 206; Mich. Comp. Laws 1948, § 211.1, et seq.; Mich. Stat. Ann. (Henderson) § 7.1, et seq.].

[16]

Mich. Pub. Acts 1949, No. 261; Mich. Comp. Laws § 211.9 [As so amended, this section does not appear in the current volumes]; Mich. Stat. Ann. (Henderson) § 7.9.

[17]

Mich. Pub. Acts 1952, No. 180; Mich. Comp. Laws § 505.1; Mich. Stat. Ann. (Henderson) § 24.64(1) [This section does not appear in either the current Mich. Comp. Laws or Mich. Stat. Ann.].

[18]

Mich. Pub. Acts 1923, No. 91; Mich. Comp. Laws 1948, § 512.17; Mich. Stat. Ann. (Henderson) § 24.105 [This section does not appear in the current Mich. Stat. Ann.].

are subject to the 4 mill tax on paid-in capital and surplus, imposed by Act 85, Mich. Pub. Acts 1921.[19]

B. MICHIGAN SAVINGS AND LOAN ASSOCIATIONS LEGISLATION

The state associations here under attack were created and are regulated and controlled by Act 50 of the Michigan Public Acts of 1887,[20] as amended. Section 1[21] reads in part:

> "A building and loan association, as contemplated by this act, is any association or corporation heretofore or hereafter organized or incorporated under any building and loan association law for the purpose of acquiring, building and improving homesteads, removing incumbrances therefrom, accumulating money to be loaned to its members or as hereinafter provided, or assisting its members to accumulate and invest their savings, and which association accumulates the funds thus loaned or otherwise invested, in part, through the issuance or sale of its own stock or shares. • • •."

Section 2[22] provides, in part, for the filing of articles

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[19] Mich. Comp. Laws § 450.301, et seq.; Mich. Stat. Ann. (Henderson) § 21.201, et seq.

[20] Mich. Comp. Laws § 489.1, et seq.; Mich. Stat. Ann. (Henderson) § 23.541, et seq.

[21] Mich. Comp. Laws 1948 § 489.1; Mich. Stat. Ann. (Henderson) § 23.541 [This language does not appear in the current Mich. Stat. Ann.].

[22] Mich. Comp. Laws 1948, § 489.2; Mich. Stat. Ann. (Henderson) § 23.542 [This language does not appear in the current Mich. Stat. Ann.].

of association with the secretary of state and provides that

> "• • • the secretary of state may refuse to record such articles if he has reason to believe that the proposed corporation is to be formed for any other than legitimate building and loan business, • • •."

Said section further provides for the adoption of by-laws by the association but requires the secretary of state to approve such by-laws before they are operative.

Section 5[23] provides for the issuance of savings shares, including the following classes: installment savings shares, optional savings shares, advanced payment shares, fully paid shares, and reserve shares. Reserve shares are akin to a stock interest and were limited in gross amount and to a percentage of the assets of such association.[24]

Section 6[25] provides for the withdrawal of unpledged shares and provides

> "• • • That the rate of earnings paid on withdrawals shall not exceed the rate of net earnings of the association: • • •"

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[23] Mich. Comp. Laws 1948, § 489.5; Mich. Stat. Ann (Henderson) § 23.545.

[24] Only one association in Michigan, namely, Central Savings and Loan Association of Detroit, has any reserve shares. The statute no longer provides for reserve shares (Act No. 148, Michigan Public Acts of 1958).

[25] Mich. Comp. Laws 1948, § 489.6; Mich. Stat. Ann (Henderson) § 23.546.

Section 8[26] requires that

"* * * No loans shall be made by such association to anyone not a member thereof (except as hereinafter provided in section 33 of this act).

"Borrowers shall be required to make application for membership. * * *. All borrowers and contract purchasers from an association shall be members of the association and shall be issued certificates evidencing such membership, * * *. At all meetings of the members of the association each borrowing or otherwise obligated member shall be entitled to 1 vote either in person or by proxy for each such obligation. * * *"

Section 8a[27] permits an association to invest funds in federal home owners' loan act bonds, and Sec. 8b[28] permits the association to loan to those eligible for a loan by the "servicemen's readjustment act of 1944."

Section 11[29] refers to the associations organized under the act as "being of the nature of cooperative associations."

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[26]

Mich. Comp. Laws 1948, § 489.8; Mich. Stat. Ann. (Henderson) § 23.548.

[27]

Mich. Comp. Laws 1948, § 489.8a; Mich. Stat. Ann. (Henderson) § 23.549.

[28]

Mich. Comp. Laws 1948, § 489.8b; Mich. Stat. Ann. (Henderson) § 23.549(1).

[29]

Mich. Comp. Laws 1948, § 489.11; Mich. Stat. Ann. (Henderson) § 23.552.

Section 16[30] provides in lieu of the homestead exemption that the shares held by any member in the amount of $1,000 shall not be subject to levy and sale on execution or attachment.

Section 24[31] provides for the determination of gross earnings at least once each year and requires 5 per cent of the gross earnings, after all expenses, to be placed in a legal reserve together with any full paid reserve shares until the legal reserve reaches 10 per cent of the association's liability to shareholders. Said section then requires that the residue of the earnings (after legal reserve and expense deductions)

> "• • • shall be transferred to an undivided profit account and apportioned to the credit of shareholders as the association in its by-laws shall determine: Provided further, That after the aforesaid apportionment has been made, the balance in the undivided profit account shall not at any time exceed 5 per cent of the total assets of the association. • • •"

Section 24a[32] permits one association to transfer its assets to any other association; section 25[33] permits con-

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[30]
Mich. Comp. Laws 1948, § 489.16; Mich. Stat. Ann. (Henderson) § 23.557.

[31]
Mich. Comp. Laws 1948, § 489.24; Mich. Stat. Ann. (Henderson) § 23.565.

[32]
Mich. Comp. Laws 1948, § 489.24a; Mich. Stat. Ann. (Henderson) § 23.566.

[33]
Mich. Comp. Laws 1948, § 489.25; Mich. Stat. Ann. (Henderson) § 23.567.

solidation; and section 36[34] permits an association to invest in government bonds, state, federal and local bonds; and interest bearing obligations of the federal home loan bank system and the federal savings and loan insurance corporation. An association is permitted to purchase shares, either by cash or transfer of assets, and become a member of any federal savings and loan association or of any corporation organized under the laws of the United States that permits the ownership of stock and membership therein by building and loan associations. Such association can obtain or terminate the insurance protection provided by title 4 of an act of Congress known as the "national housing act."

Section 37[35] provides:

> "No building and loan association shall, directly or indirectly, do a banking business, or advertise for or accept deposits. Any advertisement or any offer to accept or receive deposits with or without the promise to pay interest thereon, shall be prima facie evidence of a violation of this provision."

Section 38[36] allows any Michigan association to consolidate with or be converted into a federal savings and loan association.

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[34]

Mich. Comp. Laws 1948, § 489.36; Mich. Stat. Ann. (Henderson) § 23.579.

[35]

Mich. Comp. Laws 1948, § 489.37; Mich. Stat. Ann. (Henderson) § 23.580.

[36]

Mich. Comp. Laws 1948, § 489.38; Mich. Stat. Ann. (Henderson) § 23.581.

Section 39[37] permits any association to organize a new federal savings and loan association.

Section 40[38] permits any federal savings and loan association to be consolidated with or be converted into a state chartered association.

The pattern of these statutory provisions would indicate that the Michigan savings and loan associations, and those admitted to do business in this State as foreign associations, are created and regulated as mutual thrift institutions for the advancement of thrift savings and home ownership.[39]

C. THE HOME OWNERS LOAN ACT OF 1933[40]

The statutory pattern relating to federal savings and loan associations is not unlike that pertaining to the Michigan associations. Appellant claims no material difference between the two. The Congress, in 1933, passed what is known as the "Home Owners Loan Act of 1933".

By that act, Congress for the first time authorized the

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[37] Mich. Comp. Laws 1948, § 489.30; Mich. Stat. Ann. (Henderson) § 23.582.

[38] Mich. Comp. Laws 1948, § 489.40; Mich. Stat. Ann. (Henderson) § 23.583.

[39] As found by the trial court:

"The Michigan Act has not been substantially changed since its adoption in 1887. * * * It has been amended to make it compatible with the Federal 1933 Statute. * * *" (R. 105a)

[40] June 13, 1933, ch. 64, § 1, 48 Stat. 128; 12 U.S.C. 1461, et seq.

organization of Federal Savings and Loan Associations and defined their purpose in these words:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board [Federal Home Loan Bank Board] is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States. (Section 1464(a))
>
> "Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board. (Section 1464(b))
>
> "Such associations shall lend their funds only on the security of their shares or on the security of first liens upon homes or combination of homes and business property within fifty miles of their home office: * * *." [Bracketed material added] (Section 1464(c))[41]

In subdivision (g), the act authorizes the Secretary of

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[41] June 13, 1933, ch. 64, § 5, 48 Stat. 132; as last amended Sept. 2, 1958, Pub. L. 85-857, § 13 (f), 72 Stat. 1264; 12 U.S.C. 1464, subsections (a), (b) and (c).

the Treasury to subscribe for preferred stock in such associations and by subdivision (j) to invest in full paid income shares of the associations.[42]

Section 1465 provides:

"To enable the Board to encourage local thrift and local home financing and to promote, organize, and develop the associations herein provided for or similar associations organized under local laws, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $150,000, to be immediately available and remain available until expended, subject to the call of the Board, which sum, or so much thereof as may be necessary, the Board is authorized to use in its discretion for the accomplishment of the purposes of this section without regard to the provisions of any other law governing the expenditure of public funds. For the purposes of this section the Secretary of the Treasury is authorized and directed to allocate and make immediately available to the Board, out of the funds appropriated pursuant to section 1464(g) of this title, the sum of $700,000. Such sum shall be in addition to the funds appropriated pursuant to this section, and shall be subject to the call of the Board and shall remain available until expended. The sums appropriated and made available pursuant to this section shall be used impartially in the promotion and development of local thrift and home-financing institutions, whether State or Federally chartered." (June 13, 1933, ch. 64, § 6, 48 Stat. 134; as last amended May 28, 1935, ch. 150, § 19, 49 Stat. 297.)

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[42] *Ibid.*, subsections (g) and (j).

And in section 1464(h) Congress dealt specifically with the taxation of such associations in this language:

> "Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States (except the taxes imposed by sections 1410 and 1600 of Title 26 with respect to wages paid after December 31, 1939, for employment after such date, and except, in the case of taxable years beginning after December 31, 1951, income, war-profits, and excess-profits taxes), and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." (June 13, 1933, ch. 64, § 5, 48 Stat. 132; as last amended Sept. 2, 1958, Pub. L. 85-857, § 13 (f), 72 Stat. 1264.)

D. ADDITIONAL FEDERAL LEGISLATION PERTAINING TO MUTUAL THRIFT INSTITUTIONS

The creation of and function performed by savings and loan associations, both state and federal, are closely related to other federal legislation in the field of home financing and thrift savings.

As part of the land bank system established by Congress, in addition to federal savings and loan associations, Con-

gress permitted the creation of national farm-loan associations.[43] Such associations are permitted to receive funds from the federal land bank,[44] and are permitted to make loans to their members.[45] Borrowers are required to subscribe to shares of stock in such farm loan associations in the amount of 5 per cent of the amount of the desired loan.[46] Such associations are exempt from federal, state, municipal and local taxation, except taxes upon real estate held, purchased, or taken by the associations.[47]

Another such institution is the *Federal Farm Mortgage Corporation*,[48] whose present duties are discharged by the *Farm Credit Administration*.[49] The mortgages executed or held by such corporation are deemed held by a United States Government instrumentality and are exempt from taxation.[50] The United States Government is required to furnish the capital of this corporation as deemed

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[43]

July 17, 1916, ch. 245, title I, § 1, 39 Stat. 360; as last amended by Ex. Ord. No. 6084, Mar. 27, 1933; 12 U.S.C. 641, et seq. Also July 17, 1916, ch. 245, title I, § 7, 39 Stat. 365; 12 U.S.C. 711.

[44]

July 17, 1916, ch. 245, title I, § 7, 39 Stat. 365; 12 U.S.C. 720.

[45]

July 17, 1916, ch. 245, title I, § 8, 39 Stat. 367; 12 U.S.C. 733. Also July 17, 1916, ch. 245, title I, § 9, 39 Stat. 368; Ex. Ord. No. 6084, Mar. 27, 1933; 12 U.S.C. 741.

[46]

July 17, 1916, ch. 245, title I, § 8, 39 Stat. 367; 12 U.S.C. 733.

[47]

July 17, 1916, ch. 245, title I, § 26, 39 Stat. 380; 12 U.S.C. 931.

[48]

Jan. 31, 1934, ch. 7, § 1, 48 Stat. 344; 12 U.S.C. 1020, et seq.

[49]

May 12, 1933, ch. 25, title II, § 40, 48 Stat. 51; 12 U.S.C. 636, et seq.

[50]

Jan. 31, 1934, ch. 7, § 12, 48 Stat. 347; Feb. 26, 1934, ch. 33, 48 Stat. 360; 12 U.S.C. 1020f.

necessary by its board of directors, up to $200 million.[51] Bonds issued, with the approval of the secretary of the treasury, by such corporation are guaranteed by the United States in the amount of $2 billion.[52] This but illustrates the pronounced congressional policy in the farm mortgage field.

Other comparable legislation in the home mortgage field is contained in the National Housing Act[53] by various guarantee, insurance and finance features.

For example, the *Federal National Mortgage Association*[54] is empowered to purchase various V.A. or F.H.A. mortgages, with the obvious purpose of furthering home ownership and financing. True to the pattern involved in the Federal Farm Mortgage Corporation and federal savings and loan statutes, the secretary of the treasury of the United States may purchase preferred stock of such associations in a substantial amount.[55] These associations are exempt from taxation.[56]

[51]

Jan. 31, 1934, ch. 7, § 3, 48 Stat. 345; as last amended July 12, 1946, ch. 570, § 2, 60 Stat. 532; 12 U.S.C. 1020b.

[52]

Jan. 31, 1934, ch. 7, § 4 (a), 48 Stat. 345; Apr. 27, 1934, ch. 168, § 14, 48 Stat. 647; 12 U.S.C. § 1020c.

[53]

June 27, 1934, ch. 847, 48 Stat. 1246; 12 U.S.C. 1701, et seq.

[54]

June 27, 1934, ch. 847, title III, § 301, 48 Stat. 1252; as last amended Aug. 2, 1954, ch. 649, title II, § 201, 68 Stat. 612; 12 U.S.C. 1716, et seq.

[55]

June 27, 1934, ch. 847, title III, § 303, 48 Stat. 1254; as last amended July 12, 1957, Pub. L. 85-104, title II, §§ 201, 202, 71 Stat. 298; 12 U.S.C. 1718, subsections (d) and (e).

[56]

June 27, 1934, ch. 847, title III, § 309, as added Aug. 2, 1954, ch. 649, title II, § 201, 68 Stat. 620; 12 U.S.C. 1723a, subsection (c).

To assure the successful achievement of the purposes of savings and loan associations and to provide mutual funds for home financing other than funds guaranteed or furnished by the United States Government, Congress created a *Federal Savings and Loan Insurance Corporation.*[57] It thereby insured the share accounts of state and federal savings and loan associations, cooperative banks and homestead associations in a manner comparable to insurance of bank deposits by the *Federal Deposit Insurance Corporation.*[58] Each deposit[59] or share account[60] is insured up to the amount of $10,000. The initial insurance premium for banks is 1/12 of one per cent of net deposits[61] and for savings and loan associations, 1/12 of one per cent of insured accounts and credit obligations.[62] Membership in the *Federal Savings and Loan Insurance Corporation* is required of federal associations and is open to state building

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[57]
June 27, 1934, ch. 847, title IV, § 401, 48 Stat. 1255; July 16, 1952, ch. 883, 66 Stat. 727; 12 U.S.C. 1724, et seq.

[58]
Sept. 21, 1950, ch. 967, § 2 [1], 64 Stat. 873; 12 U.S.C. 1811, et seq.

[59]
Sept. 21, 1950, ch. 967, § 2 [3], 64 Stat. 873; as last amended Aug. 1, 1956, ch. 852, § 3, 70 Stat. 908; 12 U.S.C. 1813, subsection (m).

[60]
June 27, 1934, ch. 847, title IV, § 405, 48 Stat. 1259; as last amended Aug. 2, 1954, ch. 649, title V, § 501 (2), 68 Stat. 633; 12 U.S.C. 1728, subsection (a).

[61]
Sept. 21, 1950, ch. 967, § 2 [7], 64 Stat. 876; 12 U.S.C. 1817, subsection (a).

[62]
June 27, 1934, ch. 847, title IV, § 404, 48 Stat. 1258; as last amended June 27, 1950, ch. 369, §§ 7, 8, 64 Stat. 259; 12 U.S.C. 1727, subsection (a).

and loan, savings and loan and homestead associations, as well as cooperative banks.[63]

The *Federal Savings and Loan Insurance Corporation* was to have an initial capital of $100 million, to be subscribed for by the Home Owners Loan Corporation.[64] Money of the corporation must be deposited in the treasury of the United States or, upon the approval of the secretary of the treasury, in any federal reserve bank, or shall be invested in obligations of or guaranteed as to principal and interest by the United States. Upon designation by the secretary of the treasury, such corporation may be a depositary or fiscal agent of the United States.[65]

As a miscellaneous footnote to this type of congressional involvement, Congress has stated:

> "The Congress declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under that Act is to be used principally for residential use; and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding." (June 27, 1934, c. 847, Title V, § 513, as added Aug. 2, 1954, c. 649, Title 1, § 132, 68 Stat. 610; 12 U.S.C.A. § 1731b(a).)

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[63] Sept. 21, 1950, ch. 967, § 2 [4], 64 Stat. 875; 12 U.S.C. 1814, subsection (b).

[64] June 27, 1934, ch. 847, title IV, § 402, 48 Stat. 1256; as last amended Aug. 11, 1955, ch. 783, title I, § 109 (a) (3), 69 Stat. 640; 12 U.S.C. 1725, subsection (b).

[65] *Ibid.*, subsection (d).

The establishment of credit unions[66] by Congress follows substantially the same pattern as that of the other federally created corporations heretofore referred to. A "Federal credit union" is defined in such legislation as "a cooperative association" organized

> "* * * for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes. * * *" (June 26, 1934, ch. 750, § 2, 48 Stat. 1216; as last amended June 29, 1948, ch. 711, §§ 1, 2, 62 Stat. 1091; 12 U.S.C. § 1752.)

The provision relative to their taxation reads:

> "The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. Nothing herein contained shall prevent holdings in any Federal credit union organized hereunder from being included in the valuation of the personal property of the owners or holders thereof in assessing taxes imposed by authority of the State or political subdivision thereof in which the Federal credit union is located: *Provided, however,* that the duty or burden of collecting or enforcing the payment of such tax shall not be imposed upon any

[66] "Federal Credit Union Act." June 26, 1934, ch. 750, § 1, 48 Stat. 1216; 12 U.S.C. § 1751, et seq.

such Federal credit union and the tax shall not exceed the rate of taxes imposed upon holdings in domestic credit unions." (June 26, 1934, ch. 750, § 18, 48 Stat. 1222; Dec. 6, 1937, ch. 3, § 4, 51 Stat. 4; 12 U.S.C. § 1768.)

E. HISTORY OF SECTION 5219

It seems desirable to trace briefly the history of the federal statute from which springs the power of the several states to tax a national banking association or its shareholders.

The first federal statute granting to the several states the power to tax national banks was adopted by Congress on June 3, 1864.[67] It empowered the states to tax the shares of national banks at a rate not higher than that imposed on other moneyed capital in the hands of individual citizens, nor higher than the rate on the shares of state banks.[68] This Act permitted a state to tax the real estate of a national bank. It further required that the tax be imposed on shares at the location of the bank.

In 1868 Congress amended the Act[69] to permit a state

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[67]

"National Bank Act," June 3, 1864, ch. 106, § 41, 13 Stat. 111.

[68]

"The purpose of the restriction is to render it impossible for any State, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks, by favoring shareholders in state banks or individuals interested in private banking or engaged in operations and investments normally common to the business of banking." *First National Bank of Guthrie Center v. Anderson, County Auditor, et al.*, (1926) 269 U.S. 341 347-348.

[69]

Feb. 10, 1868, ch. 7, 15 Stat. 34.

to determine and direct the manner and place of taxing the shares of national banks located within said state, except that the shares of any national bank owned by nonresidents of a state were required to be taxed in the city or town in which the bank was located and not elsewhere. The 1868 amendment eliminated one test for the rate of taxation to be levied on national bank shares. The Act of 1864 had restricted the rate to that (1) on other moneyed capital and (2) on state banks. The amendment of 1868 retained only the moneyed capital test.

In 1878 Congress further amended the Act; but only slight changes in terminology resulted and the Act became at that time § 5219 of the Revised Statutes of the United States.

By further amendments to the Act, Congress, in 1923,[70] while still allowing the states to tax the shares of national banks, also permitted them to impose an income tax on the bank, subject to certain restrictions, or to impose an income tax on the shareholders of the bank, subject to certain restrictions. Each state was then in a position to choose one, but only one, of three methods of taxing a national bank or its shareholders. At the same time Congress also amended the Act to provide that obligations in the hands of individual citizens, not engaged in the banking or investment business and representing merely personal investments not made in competition with such business, were not to be deemed "moneyed capital" within the purview of the Act.

The final amendment to the Act was made in 1926[71]

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[70]
Mar. 4, 1923, ch. 267, 42 Stat. 1499.

[71]
Mar. 25, 1926, ch. 88, 44 Stat. (Part 2) 223.

when Congress provided a fourth method for taxing national banks by allowing a state to impose a franchise tax on the bank, i.e., a tax measured by bank earnings. This amendment further made one exception to the rule that the four permitted methods of taxation are mutually exclusive in that it permitted any state imposing an income tax on the dividends of a bank shareholder also to impose upon the bank an income or franchise tax if it chose to do so.

F. CONGRESSIONAL TREATMENT OF OTHER BANKING INSTITUTIONS

(1) Joint-Stock Land Banks[72] and National Farm-Loan Associations[73]

Congress, in establishing joint-stock land banks (together with national farm-loan associations), again spelled out congressional involvement in the farm finance field. Congress provided for the tax exemption of national farm-loan associations, including the capital and reserve or surplus therein and the income derived therefrom, except for taxes upon real estate.[74] It provided that the real property of joint-stock land banks and national farm-loan associations was subject to taxation as any other real property is taxed.[75]

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[72] July 17, 1916, ch. 245, title I, § 16, 39 Stat. 374; 12 U.S.C. § 810, et seq.

[73] July 17, 1916, ch. 245, title I, § 7, 39 Stat. 365; 12 U.S.C. § 711, et seq.

[74] July 17, 1916, ch. 245, title I, § 26, 39 Stat. 380; 12 U.S.C. 931.

[75] July 17, 1916, ch. 245, title I, § 26, 39 Stat. 380; 12 U.S.C. 933.

Congress provided for the taxation of joint-stock land bank shares in this language:

> "Nothing in sections 931-933 of this title shall prevent the shares of any joint-stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the bank is located; but such assessment and taxation shall be in manner and subject to the conditions and limitations contained in section 548 of this title with reference to the shares of national banking associations." (July 17, 1916, ch. 245, title I, § 26, 39 Stat. 380; 12 U.S.C. 932.)

(2) National Agricultural Credit Corporations[76]

Any member bank of the federal reserve system may invest 10 per cent of its paid-in capital and surplus in the stock of one or more national agricultural credit corporations.[77] Further, any agricultural or livestock financing corporation incorporated by special law of any state having sufficient unimpaired capital may, with the approval of the comptroller of the currency, become a National Agricultural Credit Corporation.[78] These corporations are empowered to make advances upon, to discount, rediscount or purchase, and to sell or negotiate notes, drafts or bills of exchange and to accept drafts or bills of

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[76] Mar. 4, 1923, ch. 252, title II, § 201, 42 Stat. 1461; 12 U.S.C. 1151, et seq.

[77] Mar. 4, 1923, ch. 252, title II, § 210, 42 Stat. 1469; 12 U.S.C. 1231.

[78] Mar. 4, 1923, ch. 252, title II, § 213 (a), 42 Stat. 1469; 12 U.S.C. 1281.

exchange under certain prescribed conditions.[79] Congress provided for their taxation as follows:

> "Taxation by a State of the shares in National Agricultural Credit Corporations, or of dividends derived therefrom, or of the income of said corporations, or real estate owned by them, shall be such only as is or may be authorized by law in the case of national banking associations; and taxation by a State of the debentures or other obligations of such corporations shall not be at a higher rate than the rate applicable to other moneyed capital in the hands of individual citizens thereof." (Mar. 4, 1923, ch. 252, title II, § 211, 42 Stat. 1469; 12 U.S.C. 1261.)

* * *

This statutory pattern shows that Congress did compare national banks with private stock corporations in the banking field for purposes of state taxation of the shares of these institutions but did not make this comparison in reference to mutual institutions. The former are taxed in consonance with § 5219 and the latter are not.

QUESTION PRESENTED

Is Act 9, Michigan Public Acts of 1953,[80] which imposed for the year 1952 a tax of 5½ mills on national bank shares, invalid under § 5219 because the Michigan

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[79] Mar. 4, 1923, ch. 252, title II, § 203 (a), 42 Stat. 1462; Feb. 8, 1927, ch. 74, 44 Stat. 1059; 12 U.S.C. 1172, subsection (1).

[80] Mich. Comp. Laws § 205.132a; Mich. Stat. Ann. '59 Cum. Supp. (Henderson) § 7.556(2a).

legislature has not treated a savings share account of a savings and loan association as being equivalent to a share of national bank stock (valued by the capital account), when the national bank loans a portion of its deposit money on residential properties and the savings and loan associations employ their mutual share account moneys for the same general purpose?[81]

STATEMENT OF THE CASE

Appellees cannot accept the appellant's statement of the case. Appellant would lead this Court to believe that national banking associations have been singled out for special tax treatment, as distinguished from general corporations and others conducting financial businesses in Michigan. An examination of the tax structure of the state of Michigan, as it affects financial institutions, clearly disproves this contention.[82]

Since the appellant has limited its case to alleged discriminatory treatment of savings and loan associations, it may be assumed that all financial businesses in Michigan, except such associations, are subject to state taxes equivalent to those imposed on appellant.

Thus, appellant's complaint is limited to alleged partial

[81]
Appellees cannot accept the appellant's "Questions Presented" (Br. 4-6). They are not properly framed either as to the findings of fact or conclusions of law of the Supreme Court of Michigan.

[82]
For a general discussion of Michigan's taxation of financial businesses, see Statutes Involved, pp 2-8.

preferential treatment of both federal and state chartered savings and loan associations, whose share accounts and total assets represent a relatively small but unknown portion of the total financial business in Michigan in 1952.

A. HISTORY OF THE RELATIONSHIP OF MICHIGAN BANKS TO ACT NO. 9, MICHIGAN PUBLIC ACTS OF 1953.

Because of the appellant's announced position in this cause that all it is seeking is "tax equality" with its competitors, and that Michigan is here charged with singling out bank shares for discriminatory taxation, the following background is deemed noteworthy.

The taxing statute here complained of, Act No. 9 of the Michigan Public Acts of 1953, in the language of the Michigan Bankers Association,

> "• • • was conceived and sponsored by the Michigan Bankers Association through the Association's Taxation Committee. The membership of this committee was composed of a cross-section of Michigan banking, representing both national and state banks, and both large and small banks. Prior to the adoption of the present Intangibles Tax Law [the aforesaid Act 9], there existed a serious tax inequity between state and national banks. National banks were protected by Section 5219 of the National Banking Act which states that a State can tax a national bank by only one of four methods:
>
> (1) A tax on bank shares
> (2) A tax on the income on bank shares

(3) A tax measured by bank income
(4) An income tax on the bank.

State banks, on the other hand, are exposed to any tax which the Legislature may see fit to impose.

"In writing the present Intangibles Tax Law, the Legislature agreed to our proposal that all banks in the state should be taxed exactly alike and to accomplish this, gave state banks an exemption from the franchise tax which they had been paying. The Legislature further agreed that since national banks were protected by Section 5219 and therefore, could not be subject to other taxes which in the future might be imposed on business and industry in this State, both state and national banks in the future would be exempt from such tax proposals. On the assurance of the Association that we would help the State defend any attack on the legality of the tax, the Legislature enacted the statute as we proposed it. Subsequently, when the State adopted a business activities tax, the Legislature lived up to its agreement and exempted all banks from this tax. It is our firm conviction that the Association has a responsibility to the Legislature to live up to the agreement which was made at that time, especially in view of the fact that the Legislature has lived up to its agreement to impose only one tax on banks in this state, and to give state banks the same protection which national banks enjoy under Section 5219." *Legal Bulletin* No. 2395, dated July 2, 1959, of the Michigan Bankers Association, 1502 Bank of Lansing Building, Lansing 16, Michigan, pp 1-2.

This statement of the Michigan Bankers Association was in response to communications dated June 8, 1959, and

June 24, 1959, wherein Howard J. Stoddard, President of the Michigan National Bank (appellant herein), attempted to get the Michigan Bankers Association to reverse its position as stated in the amicus curiae brief of that Association filed in the trial court and quoted by the trial court in its opinion (R. 67a):

> "'The Michigan Bankers Association has followed the trial of this case and requested permission to file this brief because of its conviction that the present system of the State of Michigan for the taxation of banks is reasonable from the viewpoint of the public, equitable from the viewpoint of the competitors, and practical from the viewpoint of the banks themselves. Actual experience with the taxation system shows that it has produced a reasonable amount of revenue to the State; that it has not created any competitive disadvantage among the various types of institutions; and that it has proven to be simple to administer. Such a system is obviously desirable, and this Association, believing the system to be entirely legal within the limitations of the Federal Constitution and Statutes, does not want to see it destroyed.'"

The Michigan Bankers Association further supports its position in the following language:

> "• • • Furthermore, whether or not there is any favoritism shown them [savings and loan associations in Michigan] by the present Michigan share tax depends entirely on whether you view their 'savings accounts' as being analogous to bank shares or bank deposits. If such accounts are similar to deposits, there is no inequity. If they are similar to shares, there is an inequity. The Michigan Bankers Association has felt that while these accounts may be similar

> to bank shares from the legal point of view, for all practical business purposes they are more analogous to bank deposits and therefore, the respective tax burdens should be measured by spreading them over the total resources of each institution. Viewed in this manner, the present tax is not unfair and imposes as much tax burden on savings and loan associations as it does on banks, * * *." *Legal Bulletin* No. 2395, *supra*, pp 3-4.

The Report of the Michigan Bankers Association Taxation Committee as set forth in the *M.B.A. Annual Report* for 1959-1960, at p 21, states:

> "The Committee unanimously adopted a resolution upholding the action of a previous M.B.A. Taxation Committee in its defense of the intangible tax. It was felt that this action was in keeping with our obligation to the legislature, and that a tax review at this time would not be favorable. * * *"

This represents the current position of the Michigan Bankers Association. [The affidavit of Ralph Stickle, executive manager and officer of the Michigan Bankers Association, filed as part of appellees' "Objections to Motion of Sixty-Eight Banks in Michigan to File a Brief as Amici Curiae," supports the above statements.]

In light of the foregoing, the question arises as to the nature of the involvement of the intervenors[83] and

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[83] Originally, there were seven intervenor banks but three dropped out voluntarily, namely, Dart National Bank of Mason, Michigan, First National Bank of Charlotte, Michigan, and Houghton National Bank of Houghton, Michigan. Appellant refers to the fact that several banks were not permitted to intervene on its behalf without

those requesting to participate as amici curiae in this litigation. It would seem that only one of two conclusions is possible: (1) The unanimous action of the Taxation Committee of the Michigan Bankers Association and the acquiescence in that action, with the exception of the Michigan National Bank, at the 1959-1960 meeting of the M.B.A. does not reflect the true convictions of these banking associations in regard to the way Michigan treats them taxwise; or (2) the intervenor and amici curiae banks have no true concern in this litigation but are merely along for the ride, at the request and solicitation of the Michigan National Bank.[84]

Since all of the Michigan amici curiae banks (except those that were also intervenors) have paid their intangibles taxes imposed by Act No. 9 voluntarily and without protest and have taken no action to protect any right of refund they might have, and since the intervenor banks permitted the statute of limitations to run against their

also indicating that the National Bank of Detroit, Detroit, Michigan, the Old Kent Bank, Grand Rapids, Michigan, Grand Haven State Bank, Grand Haven, Michigan, Alpena Savings Bank, Alpena, Michigan, and the Union National Bank, Marquette, Michigan, attempted to intervene as parties defendant.

[84]

It is the understanding of counsel for appellees, on information and belief, that the appellant bank, through its counsel, officers or employees, solicited the participation of the intervenor and amici curiae banks and many other banks in Michigan. Counsel for appellees further understand, on information and belief, that the intervenor and amici curiae banks have not been asked to bear any of the expense of litigation; that the intervenor's pleadings and briefs in the trial court and the amici curiae brief have been prepared at the expense of appellant bank; and that the amici curiae bank officers are not familiar with the proceedings in this cause. See appellees' "Objections to Motion of Sixty-Eight Banks in Michigan for Leave to File the Attached Brief as Amici Curiae."

right to claim refund of part of such tax moneys, it would seem that they manifest no serious objection to this tax.

Thus, it would seem that the only conclusion for such action which can be reached is that the appellant in this cause is single-handedly attempting to have declared unconstitutional by this Court, on the claim of "unfair competition" and "tax inequality," legislation drafted, sponsored, and proposed by the Michigan Bankers Association that was enacted, in part, to prevent the discrimination which existed prior to the adoption of Act No. 9 of the Michigan Public Acts of 1953 between state and national banking associations.

If the appellant's position were controlling, it and other national banking associations in the State of Michigan would again escape taxation (except taxes on real property) while all other financial institutions in that State, including savings and loan associations, except credit unions, would respond to taxes equivalent to those here complained of by appellant.

B. POSITION OF THE PARTIES

Reference is made to the trial court's opinion in Appendix A of the Jurisdictional Statement for a proper statement of the respective positions of the parties (R. 60a-68a). They were stated thus by the trial court:

> "Plaintiff contends that the Michigan Intangible Tax Act fails to meet the requirements of Section 5219 in two particulars: (1) Michigan National Bank shares are taxed at a greater rate than other moneyed capital

in the hands of individual citizens coming into competition with the business of the plaintiff bank, (2) that the Michigan Statute levies a tax upon 'the privilege of ownership' of shares in national banks, that this is not the legal equivalent of a tax upon the shares in such banks and is not one of the alternate methods of taxation permitted." (R. 62a)[85]

"Initially, the moneyed capital alleged by plaintiff to be in competition with it and to be taxed at a lesser rate included building or savings and loan associations, insurance corporations, credit unions, finance companies, and monies in the hands of individuals and partnerships.

"Shortly before the commencement of trial, plaintiff abandoned its claim insofar as insurance corporations, credit unions, finance companies and individuals and partnerships were concerned, and its counsel stated that it would confine its case to the competition which national banks face in this state with building and savings and loan associations, both state and federal.

• • •

"Without attempting to state in detail the proofs • • •, it may be said that plaintiff claims that the proofs bring the case within the rule stated in *First National Bank* v. *Hartford*, 273 U.S. 548: • • •." (R. 62a-63a.)

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[85] Contention (2) has been abandoned by the appellant, since it is not mentioned in its Jurisdictional Statement or brief.

"In support of such claim, plaintiff offered a mass of statistical evidence as to the capital, assets, savings accounts, loans and investments of national banks, nationally, state-wide and of the plaintiff national bank. Like evidence was offered as to the business of the savings building and loan associations, nationally, state-wide and in the seven cities in which plaintiff did business.

"Plaintiff further offered the testimony of officers of the loan associations and of the plaintiff banks as to the existence of competition between the two types of institutions.

"And plaintiff forcefully urges that such evidence establishes that both plaintiff and defendant make loans upon the security of mortgages on residential real property and that in that field there exists, in fact, substantial competition between the plaintiff bank and the several savings building and loan associations.

"Plaintiff further contends that the rate of tax levied against the shares of national banks is several times that levied against the shares of savings building and loan associations.

"Defendants take issue with plaintiff upon the existence of competition in fact, and upon the existence of discrimination in the rate of tax against the two types of institutions.

"With references to competition, in fact, defendants contend that the savings and loan associations operating in the area of plaintiff bank are small institutions as compared to the plaintiff; that they function solely

in a very narrow and restricted field compared to the varied activities of plaintiff and other national banks; that the savings and loan associations' basic organization and financial structure are so different from national banks that they cannot be compared with such institutions; that the alleged competing savings and loan associations concentrate their loans in conventional loan activity prohibited to plaintiff bank while plaintiff concentrated its loan activity in fields (F.H.A. and V.A.) not utilized by the savings and loan associations; that the proofs offered do not sustain a finding that the capital employed by savings and loan associations in 1952 represented a substantial portion of capital employed in any alleged competition by the savings and loan associations with the business of the plaintiff and other national banks; that plaintiff had no difficulty in obtaining all the capital it needed in 1952 and could not trace any part of its capital to any investments and that in 1952 it loaned only its deposit money on security of real estate.

"And defendant summarizes its position on this factual issue as follows: 'in the last analysis, savings and loan associations cannot be in "substantial competition with the business of national banks" because they cannot and do not engage sufficiently in the activities characteristically carried on by the national banks. Stated another way, if they are not comparable institutions in substance, how can they be in substantial competition?'

"Upon the issue of discrimination, it is defendants' contention that the Michigan Intangible Tax from the standpoint of the economic impact, imposes an equivalent tax burden on national banks and savings and loan associations.

"Defendants further present certain serious contentions of law which, if decided in favor of defendants, make the determination of the above issues of fact unimportant. These, to a certain extent, overlap and may be briefly summarized: first, that the states have the power to give preferential tax treatment to thrift and home financing institutions such as mutual savings banks and savings/building and loan associations upon the ground that public policy without violating section 5219; and, secondly, that Congress by the enactment of the 1933 Home Owners Loan Act has made it clear that the provisions of section 5219 do not apply to savings/building and loan associations.

"The banks of Michigan are not unanimous in this litigation.

"The Michigan Bankers Association has been permitted to file a brief as amicus curiae in which it states the position of its members * * * [quoted *supra*, p 31]:

* * *

"And their counsel takes substantially the same position upon the several questions presented as does the Attorney General on behalf of the defendants." (R. 65a-67a) (Emphasis supplied) [Bracketed material added]

C. STATEMENT OF FACTS

1. Introduction

The facts in this cause pertain primarily to a consideration of the purpose, nature, financial structure and activi-

ties of the appellant bank and national banks in general as compared to 16 savings and loan associations (operating in the area where appellant bank has branch offices) and other mutual thrift institutions generally. These facts were developed with emphasis upon:

1. The nature, character, purpose and function of savings and loan associations and mutual savings banks as compared to national banking associations;

2. A determination of whether the Michigan tax system discriminated against national bank stock as compared to savings and loan association share accounts; and

3. The nature and extent of involvement of both savings and loan associations and national banking associations in the residential mortgage market.

Appellant attempts to frame an additional factual issue, namely:

> "Since the Early Days there have been Substantial Changes in Character, Method, Manner and Scope of Operations of Savings and Loan Associations." (Br. 20)

There is no evidence in the record to support such statement. In appellant's recitals in support of this statement (Br. 20-24), it cites no page of the record in this cause, nor does appellant define what it means by "Early Days."

The record in this cause supports the proposition that there has been no significant change in Michigan savings and loan associations since their creation by Act No. 50, Michigan Public Acts of 1887; that they are the same in purpose, character, and practices as the federal savings

and loan associations of the present day and of the 1930's (R. 105a, 734a, 735a); and

> "That from their beginnings and continuously throughout their history, building and loan associations have been similar in character and purpose to and of the same general class of mutual thrift and home financing institutions as mutual savings banks." (R. 109a)[86]

It should further be noted that the appellant has not attempted to bring its case factually within the restrictions generally of § 5219. Appellant by its argument concedes, that the Michigan legislature, in enacting Act No. 9 of the Michigan Public Acts of 1953, did not evidence an unfriendly or hostile attitude toward investments of national bank shares; that the alleged tax discrimination, in actual practice, has not resulted in unequal or unfriendly competition between investors in national bank shares and other moneyed capital in this state; that as a matter of fact the moneyed capital of savings and loan associations employed in competition with the business of appellant and other national banking associations does not constitute a relatively material part of all other moneyed capital in this state; or that as a matter of fact Act No. 9 was enacted for no other purpose than to provide tax equality between financial institutions.

It is therefore apparent that the appellant has not proven its case within the purview of § 5219.

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[86]

These statements are also supported by the legislation creating the state and federal associations, referred to in Statutes Involved, pp. 9-17, *supra*. As there indicated, both Michigan and federal savings and loan associations are organized and supervised as mutual thrift institutions created to encourage home ownership and thrift savings.

The appellant erects its case primarily on evidence pertaining to the involvement of national banking associations generally and appellant in particular in the home mortgage field in competition with savings and loan associations. The involvement of both of these institutions in the residential mortgage market, as a factual proposition, is obvious. Appellant assumes that this constitutes substantial competition within the purview of § 5219, so as to invalidate a share tax on national bank stock, unless a savings and loan savings share account is taxed at the same rate as a share of national bank stock. As a mixed question of fact and law (*First National Bank* v. *Hartford*, (1927) 273 U.S. 548), the Supreme Court of Michigan concluded that savings and loan associations in Michigan in 1952 were not in substantial competition with the business of appellant and other national banking associations because:

(1) The involvement of the savings and loan associations in the home mortgage market by the use of savings share account moneys could not be competitively compared to the involvement of national banking associations in the residential mortgage market by the employment of a source of other moneyed capital, namely, **deposits**, that was denied to savings and loan associations. Essentially, this is but recognizing the basic fundamental differences between savings and loan associations and national banking associations.

(2) Assuming that the institutions could be compared, still the area of overlap between the activities, functions and business of the national banks and those of the savings and loan associations in Michigan is so narrow and restricted, because of the limited scope of operations of savings and loan associations and the limited involvement

of national banking associations generally in the residential mortgage market (and that primarily in an area fostered by Congress, namely, F.H.A. and V.A. fields), that these institutions could not be considered to be in substantial competition.

Other evidence pertaining to the question of the nature, character, purpose and functions of savings and loan associations is directed to a consideration of whether the savings and loan associations share accounts could be compared to national bank stock for competition and tax discrimination purposes. The uncontradicted testimony of Professor George W. Woodworth, Professor of Finance and Banking at the University of Michigan, was to the effect that a share of stock in a national banking association constitutes an equity investment and cannot be compared to a savings and loan savings share account; that a savings and loan share account is comparable to a bank deposit or a deposit in a mutual savings bank; and that there is no difference in substance between savings and loan share accounts and bank deposits (R. 827a-831a). Since this is a well-established factual proposition, it is clear that the appellant has made no case in regard to either the factual question of competition or a factual question in regard to discrimination, for admittedly the appellant invests an aliquot part of its deposit moneys in the residential mortgage field and not its stock, and admittedly the savings and loan associations invest in residential mortgages moneyed capital represented by their share accounts, and admittedly bank deposits in Michigan are taxed at a lesser rate than are the savings share accounts of savings and loan associations.

There follows for consideration of this Court a summary of facts pertaining to national banks generally, to the ap-

pellant bank in particular, to savings and loan associations generally, to savings and loan associations in Michigan, and to those sixteen associations in the so-called competitive area of appellant bank. Additional facts pertaining to alleged competition and discrimination will be set forth in the argument part of the brief.

2. Facts Pertaining to National Banks Generally

The primary objective of Congress in creating the National Bank Act was a monetary one (R. 807a) and grew out of the chaotic state of the currency in the early 19th century (R. 809a).[87]

The primary function of national banks, as originally created and up to and including 1932, was a monetary one (R. 823a). It consisted of: (1) providing checkbook money (demand deposits) (Df. Ex. 219; R. 814a, 1282a); (2) receiving, paying out, clearing, collecting and transferring money payments (R. 823a); (3) paying out and receiving currency (R. 823a); (4) acting as a depository for the Federal Government (R. 823a); and (5) performing miscellaneous services such as dealing in foreign and domestic exchange and holding reserve balances of commercial banks (R. 824a).

National banks provided 56% of the checkbook money, which amounted to about 90% of all money payments in the United States in 1952 (Df. Ex. 219; R. 814a, 1282a).

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[87] See the opinion of the trial court (R. 69a-73a) for a brief discussion of the history of the enactment of the National Bank Act on June 3, 1864.

No other financial institutions can create checkbook money (R. 818a).[88]

Their secondary function within this period included making loans and investments; receiving time and savings deposits; and providing trust, safekeeping and miscellaneous bank services (R. 824a, 825a).

From the time of the National Bank System's inauguration up through 1952, the ratio of deposits to capital changed markedly as indicated by the rapid increase in checkbook money (R. 815a, 818a). No distinction was made on national bank reports prior to 1913 between time and demand deposits (R. 818a). In 1913, time deposits were only about 1/6th of total deposits and have subsequently accounted for an increasingly larger proportion of the total assets and total deposits (Df. Ex. 219; R. 814a, 1282a).

National banks in 1952 could only make conventional mortgage loans for a term not greater than ten years and in an amount not exceeding 60% of the real estate's valuation.

National banks in the United States, as of 1952, held residential real estate loans amounting to 6% of total assets (Df. Ex. 224A; R. 838a, 1289a). Of residential real estate loans, 61.2% were F.H.A. or V.A. mortgages (R. 840a).

In 1865, total deposits represented only about 40% of total national bank assets; in 1919, they accounted for

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[88]

Mr. George Walter Woodworth, Professor of Finance at the University of Michigan and specializing in money and banking, describes this process on pp R. 816a-818a.

approximately 62%, and as of December 31, 1952, total deposits represented almost 92% of total assets (Df. Ex. 219; R. 814a, 1282a).

National banks required a higher degree of liquidity than any other institution since all of their deposits were demand or near-demand obligations (R. 825a). National banks preferred F.H.A. and V.A. loans because of their liquidity and shiftability. These loans are readily bought and sold in the market and, therefore, the national banks specialize in these types of mortgage loans as compared to conventional loans (R. 841a).

The *character* and *purposes* of national banks have not changed in any material respect since 1926. In 1952, they were engaged in the same type of activity and carried on the same business and economic function for which they were created (R. 823a, 824a).

On December 31, 1952, the national banks located in the seven cities in which appellant has its branch offices had total assets of approximately $664,000,000 (Df. Ex. 207; R. 672a, 1269a).

3. Facts Pertaining to Appellant Bank

The appellant's home office is in Lansing. It does business in the state of Michigan and throughout the United States (R. 702a) through its principal office in Lansing and its seven branches, located in Lansing, Flint, Saginaw, Port Huron, Marshall, Battle Creek and Grand Rapids (R. 7a). In conducting its banking business, it employed approximately $306,000,000 of assets, 4.3% of which (approximately $13 million) represented the capital account of the bank (Pl. Ex. 3; R. 529a, 931a-935a). This capital ac-

count included preferred stock, common stock, retirement reserve, surplus, and undivided profits (R. 932a).

Appellant bank was organized in 1941. It has experienced a substantial and profitable growth. In 1941 it started business by issuing 150,000 shares of stock of $10 par value. A **$1000** original investment in 1941 would have returned to the investor by 1952, **$1,308.80** in cash dividends (Df. Ex. 204B; R. 672a, 1296a). In addition, stock dividends and market appreciation made the original investment worth **$6,691.20** in 19[illegible] (Df. Ex. 204B; R. 672a, 1296a) — 800% of the original investment or an **average annual increase of 60%**.

The ownership of its shares was concentrated in a relatively few shareholders of common stock, there being 3%, or 68 holders out of a total of 2,277 common stockholders, who owned 62% of all outstanding common stock in 1952 (R. 709a). Approximately 50% of appellant's shares are owned by individuals in the highest tax bracket (R. 1328).

The appellant bank carried on all the functions and activities characteristic of a national banking association, including the following: providing checkbook money; receiving, paying out, clearing, collecting and transferring money payments; paying out and receiving currency; acting as a depository for governmental agencies, including the Federal Government and the United States Treasury Department; dealing in foreign and domestic exchange; holding balances of other banks; and making loans on the strength of financial statements of borrowers, on the security of shares of stock, bills of lading, fungible goods, oil properties, oil leases, automobiles, appliances, trailers, insurance policies, and livestock, both within and without the state of Michigan. It maintained safe deposit facilities; maintained a

trust department and acted as trustee for testamentary and inter vivos trusts; issued letters of credit; sold, shipped and received securities; and acted as transfer agent, registrar and dividend disbursement agent, coupon paying agent, and trustee in connection with corporate stock issues or under indenture agreements (R. 679a-683a).

In 1952 the appellant loaned money secured by real estate in, as well as outside of, Michigan (R. 702a). The principal type of loans to persons outside Michigan was in so-called "trailer paper," which produced a substantially greater yield per dollar loaned than residential mortgages (R. 693a). Among appellant's borrowers were finance companies (R. 682a) and municipalities (R. 685a). Savings and loan associations could loan only on real estate mortgages within the immediate vicinity of their location.

The appellant sold mortgages it had originated to other institutions, making a profit on these transactions. It was looking for additional mortgage brokerage business (R. 706a). This was not true of the alleged competing savings and loan associations.

In 1952 appellant had total deposits of some $283,000,000, classified into approximately *$165,000,000 of commercial deposits* (including $22,000,000 of public funds), *upon which no interest was paid to the depositors*, approximately $37,000,000 in time certificates, and approximately $81,000,000 in savings deposits (Df. Ex. 202, R. 672a R. 1263a). In 1952 all the funds it had to loan were from deposits. The savings and loan associations in Michigan cannot accept deposits and, therefore, had none.

Since its original incorporation in 1941, i.e., from December 31, 1941, to December 31, 1957, appellant has grown in total resources from about $68,000,000 to approximately

$481,000,000 without the issuance of any additional common stock except stock dividends (Df. Ex. 202, R. 672a, 1262a; Df. Ex. 203B; R. 672a, 1315) [Offered as 203A].

In contrast, almost all the growth of savings and loan associations in Michigan was from the issuance of additional savings share accounts. The appellant bank alone grew in total assets at the average rate of $25,000,000 per year from 1941 to 1952 while all savings and loan associations in Michigan grew only $10,000,000 per year. Appellant's gross operating income was approximately $12,000,000, of which a little over $11,000,000 constituted interest income derived from the following sources: Securities, $2.2 million; general loans, $1.2 million; mortgage loans, $2.6 million; and installment loans, $5 million (Df. Ex. 205, R. 672a, 1266a, 1267a). About 20% of appellant's total assets were employed in mortgage loans (Df. Ex. 202; R. 672a, R. 1262a), and approximately 23% of its interest income was received from mortgage loans (Df. Ex. 205; R. 672a, R. 1266a). In the loan field, appellant's installment loans unsecured by real estate, were the most profitable. Here, appellant received approximately 45% of its total interest income from the employment of approximately 19% of its total assets (Df. Ex. 205; R. 672a, 1266a).

The interest income of appellant-bank in 1952, from all its mortgage activities, was 26% of its total income and 21.8% of its total income after excluding F.H.A. Title I Home Improvement interest income. Its total real estate loans amounted to 22% of its gross assets and 20.2% of its total assets after excluding F.H.A. Title I Home Improvement loans (R. 761a, 762a).

Appellant was engaged in the real estate mortgage market and apparently was able to satisfy its demand for residential real estate mortgages, except for additional mort-

gages to brokerage (R. 706a). Appellant used all of its funds, capital, surplus, undivided profits, reserves, and deposits for the operation of its business (R. 708a). It cannot allocate or trace any dollar of its capital account to any particular mortgage or loan business (R. 689a). The appellant bank was attempting to make as much money as possible for its stockholders (R. 686a, 687a). Its entire capital was available for doing business in whatever locality it operated (R. 688a). All of its capital was used in competition with all the other moneyed capital in each area in which it did business (R. 688a, 689a). Its stock was not insured by any federal agency, but each deposit was insured up to $10,000 by the Federal Deposit Insurance Corporation (R. 690a, 691a).

The comptroller of the currency was concerned with the appellant's concentration of its assets in trailer paper (Df. Ex. 4-A-1; R. 1331, 1320). As to this charge, the bank answered that they had "enough" capital in 1952.

Appellant bank treated F.H.A. loans as liquid items in 1952 because they are guaranteed by a branch of the federal government (R. 694a) but did not so treat conventional mortgage loans (R. 697a, 698a).

The appellant did not make any conventional mortgage loans on residential real estate with a term of more than 10 years nor an amount of more than 60% of the appraised value. Only a "small percentage" of the appellant's conventional mortgages were construction loans to individuals (R. 675a). Its improvement loans were not secured by real estate mortgages (Pl. Ex. 3; R. 592a, 934a).

The total real estate loans of Michigan National Bank represented 22% of its total assets, and residential real estate loans were 20.2% of total assets (R. 761a, 762a).

Its F.H.A. and V.A. loans constituted 70% of the latter (R. 842a). F.H.A. and V.A. loans were 14% of total assets (70% or 7/10 of 20%), while conventional mortgages amounted to 6% of total assets.

4. Facts As to Savings and Loan Associations Generally

Historically and currently, the business of savings and loan associations is predominantly in the field of gathering thrift savings and lending these accrued savings for home ownership on the basis of long-term residential mortgages (R. 854a).

Savings share accounts represent 84.7% of the associations' assets (R. 850a). These accounts are always open to receive small additional amounts from savings customers (R. 850a, 851a).

Savings and loan associations have not changed their business character or practices since 1933 (R. 864a, 865a). There has been a change in the technical method by which the associations operate, but there have been no substantial changes in their business character of accumulating small thrift accounts and lending them for home building purposes (R. 894a, 895a).

The fact that savings and loans members were both borrowers and lenders in the early times was a superficial aspect of the organization. The mutuality in substance is that the associations are not private profit institutions with capital stock (R. 898a).

Savings and loan associations are similar to mutual savings banks and in 1952 were not similar to national banks (R. 827a). Investors in savings and loan associations

are comparable to depositors in mutual savings banks (R. 827a-829a) and in commercial banks (R. 845a).

The general public was able to make investments in savings and loan accounts at will (R. 850a, 851a). They were entitled to withdraw their savings share accounts at any time (subject to a 30-day notice requirement rarely invoked) and, in the event of withdrawal (except in the unlikely case of liquidation), they would receive only the face amount paid plus credited dividends (R. 851a).

Unlike shares in national bank stock, savings and loan shares do not appreciate in market value. The general public is always able to purchase savings and loan shares at "par" value, thus preventing any capital gain on the share of the savings and loan associations (R. 849a-851a).

Associations were permitted to pay dividends only out of current earnings. They could not use undivided profits or reserves for this purpose (R. 731a).

5. Facts as to Savings and Loan Associations in Michigan

The facts as to savings and loan associations in the aggregate are equally applicable to the Michigan associations.

There has been no substantive change in the character and operation of savings and loan associations since 1937; their basic purposes and practices have been the same; and they served the same kind and class of people in their business activities for that period (R. 734a, 735a). The average mortgage loan in 1937 was approximately $5500 and in 1952, about $6500 to $7500 (R. 736a). Investors in savings share accounts are not in any different class from

anyone else engaged in a thrift savings program (R. 739a). Michigan savings and loan associations have equipped themselves to service and serve the lower income group, the middle-class group, or any other group in need of home mortgages (R. 740a).

A borrower from a Michigan savings and loan association automatically became a shareholder of one share as a condition attendant to granting the mortgage loan (R. 740a).

The facts pertaining to savings and loan associations generally and in Michigan (developed above) are equally applicable to the sixteen associations with offices located in the same cities where appellant has branch offices. Their savings share accounts constituted 84.9% of their total assets (Df. Ex. 209; R. 748a, 1273a). Of their total assets, 80.4% were invested in first mortgage loans (Df. Ex. 209; R. 748a, 1273a).[89] These associations *did not* maintain the following facilities or conduct the following operations: loan money to finance companies; make unsecured loans on the strength of a borrower's financial statement;[90] loan money secured by chattel mortgages, shares of stock in firms other than the associations, bills of lading, fungible goods, insurance policies, or livestock; issue letters of credit; purchase or sell securities on the order of a customer; collect notes and drafts for customers; deal in foreign exchange; maintain safe deposit or safekeeping facilities; ship and receive securities for the account of customers; operate trust departments; act as transfer

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[89]

The associations apparently had sold some of their own properties, insignificant in amount, on land contracts.

[90]

The only exceptions are the three associations that made F.H.A. improvement loans (Df. Ex. 200c; R. 714a, 1261a).

agents, escrow agents, registrars, dividend disbursing agents, coupon paying agents, or trustees for issues of securities; accept deposits; or make all loans (Df. Ex. 227; R. 671a, 1293a-1295a). The source of funds of these associations was limited to savings share accounts, undivided profits and reserves, and limited borrowing from the Federal Home Loan Bank Board.[91]

These associations did not carry on any significant loan activity other than that secured by first mortgages on residential real estate (Df. Ex. 200C; R. 714a, 1261a). Approximately 10% of their assets were in undivided profits and reserves. Undivided profits and reserves constituted approximately 11.5% of the total share accounts (Df. Ex. 209; R. 748a, 1274a; Pl. Ex's. 36-A through 36-J; R. 147a, 979a thru 988a; Pl. Ex. 45-A; R. 191a, 1007a; Pl. Ex. 61-F; R. 336a, 1017a; Pl. Ex. 73-E; R. 451a, 1126a; Pl. Ex. 77-E; R. 452a, 1159a; Pl. Ex. 81-E; R. 453a, 1193a).

Compared to appellant, the sixteen savings and loan associations alleged to be in competition with appellant are small institutions. The smallest of these had assets equal to only **.2 of one per cent** of the appellant's assets, and the largest, only 8% of the appellant's assets. The smallest association had outstanding loans equal to only **.4 of one per cent** of appellant's total loans, and the largest had 14% of the same. The smallest association's savings share accounts equaled only **.2 of one per cent** of the deposits of appellant bank, and the largest association's, only 7.5% of appellant's deposits (Pl. Ex. 3; R. 529a, 931a thru 935a; Df. Ex. 209; R. 748a, 1274a).

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[91] These borrowings were subject to rigid statutory limitations.

6. Conclusions of Fact

It is respectfully submitted that the record in this cause amply supports the following conclusions of fact:

A. Savings and loan associations in Michigan are not the types of institutions that are in substantial competition with the business of national banks.[92]

B. The basic character, purpose and functions of national banking associations and savings and loan associations in Michigan have not changed in any significant way since their early beginnings.

C. While the primary business and purpose of national banks has always been a monetary one and its secondary purpose principally the making of short-term loans and discounts, the business and *purpose* of savings and loan associations has always been the accumulation of small rivulets of thrift savings and lending these accumulations for home ownership purposes.[93]

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[92]

There is very little similarity in substance between share accounts of savings and loan associations and capital stock shares of national banks; the latter are analogous to reserves and undivided profits of savings and loan associations. Nationally such reserves and undivided profits of savings and loan associations amounted to 7.3% of their total assets, while the capital stock, surplus and undivided profits of national banks represented 6.5% of their total assets in 1952 (R. 845a). Savings share accounts, on the other hand, amounted to 84.7% of the savings and loan associations' assets in 1952 in the United States, whereas deposits in national banks were 91.8% of their total assets (R. 846a).

[93]

As above indicated, the great bulk of national bank business in 1952 was in fields which *savings and loan associations do not enter*

D. The Michigan tax system does not create a hostile or unfriendly discrimination against national banks in the way it taxes savings and loan associations and other financial institutions, as contrasted to its taxation of national banks.

E. From their beginnings and continuously throughout their history, building and loan associations have been similar in character and purpose to and of the same general class of mutual thrift and home financing institutions as mutual savings banks.[94]

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at all, such as: the creation of checkbook money; the receiving, paying, clearing, collecting and transferring of checkbook money; serving as warehouses for currency; serving as depositories of the Federal Government; dealing in foreign exchange and domestic demand drafts; issuance of officers' checks; certification of customers' checks; holding reserve balances of other banks; making short term loans to businessmen, farmers, consumers and making loans to brokers and dealers secured by stocks and bonds; providing trust department services; accepting letters of credit; collecting demand and time drafts for customers; providing safekeeping services; and selling travelers' checks (Df. Ex. 227; R. 671a, 1293a-1295a).

[94]

As testified to, in substance, by Professor Woodworth, savings and loan associations were not similar to national banks in 1952, but were quite similar to mutual savings banks. Savings and loan associations, as well as mutual savings banks, were from the beginning organized as mutual thrift associations, without shares of capital stock. In contrast, the capital stock of private business and commercial banking corporations is owned by a *separate group* seeking to make a business profit (R. 827a-830a). Mutual savings banks and savings and loan associations have always regarded real estate as the primary form of investment of savings entrusted to them (R. 830a). Their capital structure is extremely similar, savings and loan associations having, in 1952, an average capital account consisting of reserves and undivided profits amounting to 7.3% of total assets, and mutual savings banks having an average capital account amounting to 9.8% of total assets (R. 845a-84 a). Share accounts of savings and loan associations accounted for

F. There is no evidence to support a finding that the "capital" of savings and loan associations is *substantial in amount* as compared to all the moneyed capital employed in the state of Michigan in 1952 in the various phases of national banking activities and business in that state.[95]

G. There is no evidence to support a finding that a *substantial portion* of total moneyed capital employed in the state of Michigan in 1952 *came into competition* with the business of national banks or that it was taxed at a lesser rate than national bank shares.[95]

H. There is no evidence to support a finding that the savings and loan associations of the year 1900 were any less "competitive" with the then business of national banks than the savings and loan associations of 1952.

I. There is no evidence to support a finding that savings and loan associations served a different class of

84.7% of their total assets in 1952, which the savings accounts of mutual savings banks amounted to 89.6% of their total assets (R. 846a).

In the early times of their existence, savings and loan associations required borrowers to be savings members of the associations. This was a superficial aspect of the organization and was not an essential element in the mutuality of the organization (R. 898a). The mutuality in substance was, is, and always has been, that such associations are not private profit institutions with capital stock owned by a separate group, often a minority, which is seeking to make a business profit (R. 898a).

[95] When the appellant's principal witness, Mr. Fairles, was questioned about these facts, he stated that he had no knowledge (R. 701a). Otherwise, the record is silent on this point. Appellant contends that this is immaterial.

savers and borrowers in 1952 than they did historically or in the year 1900.[96]

J: There is no evidence in the Record as to the total amount of moneyed capital employed in Michigan in 1952 by financial institutions other than national banks and savings and loan associations.[97]

D. FINDINGS AND CONCLUSIONS OF THE COURTS BELOW

The trial court determined that Michigan had authority to grant preferential tax treatment to thrift and home financing institutions, such as mutual savings banks and building and loan associations, so long as it was founded upon just reason and did not operate as an unfriendly discrimination against investments in national bank shares. The court concluded that the partial exemption rule[98]

[96]

The appellant devotes a substantial portion of its brief and, in fact, premises its entire argument on the unfounded factual conclusion that in 1952 savings and loan associations in Michigan were different from the savings and loan associations of the year 1900; that they serve a different class of borrowers; and that they attract a different class of share account holders. Those conclusions and argument are completely unsupported. The *only evidence* on those points was furnished by appellees' witnesses Ethan Doty, Director of the Savings & Loan Division of the Secretary of State's Office and by Professor Woodworth and is to the contrary.

[97]

The aggregate assets of national banks in Michigan in 1952 amounted to $3,728,340,000 (Df. Ex. 226, R. 857a, 1292a), while aggregate assets of all savings and loan associations in Michigan in 1952 amounted to $534,314,000 (Pl. Ex. 6, R. 655a, 960a) about 14%, or 1/7, thereof.

[98]

Reference will be made throughout this brief to this rule, which can be generally stated, as follows: A state may exempt or prefer

was dispositive of the issues since Michigan's tax treatment of savings and loan associations as compared to national banks is based upon just reason and is not made with the hostile purpose of discriminating against national banks.

The trial Court stated in its conclusions, as follows:

"1. Since 1887, the Courts have consistently held in every case squarely involving the question that the state may exempt or prefer on the ground of public policy mutual savings banks and other like institutions, provided such exemption is based on just reason and is not made for the hostile purpose of an unfriendly discrimination with national banks.

"2. That the power of the State to make such exemptions on the ground of public policy is an important one, grounded in history and on precedent. The intention of Congress to destroy it should not be lightly inferred.

"3. The 1923 and 1926 amendments to section 5219 and the amendments to the Federal Reserve Act broadening the powers of the national banks were not intended to take from the State such long established and well recognized power.

"4. That from their beginnings and continuously throughout their history, building and loan associations have been similar in character and purpose to and

entially tax some moneyed capital employed in competition with some phases of the business of national banks without invalidating a tax on national bank shares, so long as the exemption or preferential treatment is for just reason and does not operate as a hostile or unfriendly discrimination. It does not have the connotation appellant would give it, i.e., taxing at a lower rate other moneyed capital. (Br. 60, 62).

of the same general class of mutual thrift and home financing institutions as mutual savings banks.

"5. Congress in the Home Owners Loan Act of 1933 definitely recognized and approved such classification of savings building and loan associations and the propriety of different tax treatments of banks and such associations and in effect, said that money invested in such associations is not *moneyed capital in competition with the business of national banks.* (Emphasis ours)

"6. That Michigan's tax treatment of savings-building and loan associations is based upon just cause and does not evidence an intent to create or foster a hostile or unfriendly discrimination against national banks." (R. 108a-109a)

"The proofs do not support a finding that there has been any material difference between the Michigan institutions [savings and loan associations] of the present day and those organized under the Federal Statute [Home Owners Loan Act of 1933]." (R. 105a). [Bracketed material added]

"The Michigan Act [Savings and Loan Act, Act 50, Michigan Public Acts of 1887] has not been substantially changed since its adoption in 1887. • • •" (R. 105a) [Bracketed material added]

"• • • the fact that the economic burdens imposed by the Michigan Statute are not at great variance is of force in determining whether the legislature in its treatment of taxation of savings building and loan associations acted upon the grounds of sound public policy or for the purpose of an unfriendly discrimination against national banks.

"I find nothing in the proofs or the law to indicate • • • a hostile intention on the part of the Michigan Legislature. Rather, it appears that such preference as may exist resulting largely from the difference in the character of the two institutions, was in pursuance of an established public policy long existing in the states and long recognized by the courts and by Congress as being justified by the purpose and object of savings building and loan associations." (R. 108a)

After a factual recital (R. 1335-1340) the Supreme Court of Michigan quoted the conclusions (1 through 6 above) of the trial court and further determined:

1. "The general rule of partial exemption under RS § 5219 has been well established, • • •. [Quoting from *Hepburn* v. *School Directors*, 23 Wall (90 U.S.) 480, 485; *Adams* v. *Nashville*, 95 U.S. 19, 22; *Boyer* v. *Boyer*, 113 U.S. 689, 693; *Mercantile Bank* v. *New York*, 121 U.S. 138, 145, 146, 161]" (R. 1341-1343)

2. "Tax exemption or preferential tax treatment has been applied to mutual savings banks and savings and loan associations, • • •. [Quoting from *Mercantile Bank* v. *New York*, 121 U.S. 138, 160, 161; *Davenport Bank* v. *Davenport Board of Equalization*, 123 U.S. 83, 86; *Bank of Redemption* v. *Boston*, 125 U.S. 60, 66-68; *Aberdeen Bank* v. *Chehalis County*, 166 U.S. 440, 460, 461; *First National Bank of Wellington* v. *Chapman*, 173 U.S. 205, 214; *Mercantile National Bank of Cleveland* v. *Hubbard* (ND Ohio), 98 F. 465, 471;[99]

[99]

Reversed in *Mercantile National Bank of Cleveland* v. *Hubbard* (C.C.A. 6), 105 F. 809. Upon remand, injunction issued in *Mercantile National Bank of Cleveland* v. *Lander* (ND Ohio), 109 F. 21. Appeal

Hoenig v. *Huntington National Bank of Columbus* (1932) (C.C.A. 6) 59 F. 2d 479, 482, cert. denied 287 U.S. 648.]" (R. 1343-1349)

3. "* * * that because plaintiff bank's shares were taxed at a different rate, or assessed by a different method than the method employed to tax the building and loan associations, does not violate RS § 5219: [Quoting from *Tradesman National Bank of Oklahoma City* v. *Oklahoma Tax Commission* (1940), 309 U.S. 560, 567; *Covington* v. *First National Bank of Covington* (1905), 198 U.S. 100, 114, 115; and citing *People* v. *Weaver* (1879), 100 U.S. 539]" (R. 1351-1353)

4. "Appellees introduced testimony, which was not controverted, that building and loan associations pay taxes which appellant bank does not pay (franchise, capital stock increase, use, and personal property tax), and further disclosed that the ratio of State and local taxes to total assets of the associations was **.089**, while appellant's rate was **.091**; and, also, in regard to the proportion of the intangible tax to the total assets of national banks in Michigan and the proportion of the Michigan franchise tax to the total assets of all savings and loan associations showing a ratio of **.02459** for all Michigan national banks and **.02243** for all State savings and loan associations." (R. 1353) [Emphasis supplied]

5. "The fundamental difference between a bank making loans from deposits and loans made otherwise, was recognized in *First National Bank of Shreveport*

to this Court resulted in reversal in *Lander* v. *Mercantile Bank*, 186 U.S. 458, with specific direction to reverse the circuit court of appeals and affirm judgment of District Court. (R. 1348)

v. *Louisiana Tax Commission* (1933), 289 U.S. 60, 64 • • •." (R. 1355)

6. "Appellant relies on *First National Bank of Hartford* v. *City of Hartford* (1927), 273 U.S. 548 • • •" (R. 1355)

"We do not agree with appellant that the Hartford decision overruled the *Bank of Redemption Case* [*Bank of Redemption* v. *Boston*, 125 U.S. 60] • • •." (R. 1357) [Bracketed material added]

"The *Hartford* decision established that a mixed question of fact and law is involved in determining the question of 'substantial competition' • • •." (R. 1357)

"Not only did the *Hartford* decision deal with sweeping exemptions for a large number of competing institutions, but the equivalence of the tax imposed on national banks and other institutions was not considered, • • •." (R. 1357)

7. "The record in this appeal discloses that Michigan building and loan associations operated in a narrow, restricted field, are markedly different in character, purpose and organization from national banks, and are not in 'substantial competition' with national banks." (R. 1358)

8. "The record establishes that there was practical equality of the total tax imposed upon building and loan associations and upon national banks, and an difference would be justified as partial exemptions under the decisions of the supreme court of the United States quoted above. The restriction contained in RS

§ 5219 has to do with the actual incidents and practical burden of the tax imposed.' " (R. 1358)

9. "Appellant, as a taxpayer claiming immunity from the tax, had the burden of establishing its right to the exemption. * * * Plaintiff failed to meet this burden of proof." (R. 1358-1359)

10. "We reiterate and approve the finding of the trial court:

> " 'That Michigan's tax treatment of savings/building and loan associations is based upon just cause and does not evidence an intent to create or foster a hostile or unfriendly discrimination against national banks.' " (R. 1359)

SUMMARY OF ARGUMENT

The appellees rest the affirmative of their argument on the following propositions:

1. The Michigan tax structure does not discriminate against investors in shares of national bank stock within the meaning of § 5219 by the methods employed to tax savings share accounts in savings and loan associations and national bank stock.

2. The State of Michigan is entitled to preferentially tax savings accounts of savings and loan associations as compared to national bank stock without violating § 5219.

3. The "capital" of savings and loan associations, representing savings share accounts invested in the narrow

and restricted field of first mortgage home financing, is not in "substantial competition" with the "capital" of national banks within the purview of § 5219.

4. Appellant has failed to meet its distinct burden of establishing by clear and cogent evidence and authority that Act 9 of the Michigan Public Acts of 1953, to the extent it subjects appellant's shares to taxation, is unconstitutional.

Affirmance of any one of these propositions requires affirmance of the Michigan Supreme Court.

INTRODUCTION

Resolution of the above propositions essentially turns upon the meaning of § 5219.[100] The purpose of § 5219, as approved by decisions of this Court, is properly stated in

> *First National Bank of Guthrie Center v. Anderson, County Auditor, et al., supra,* (1926) 269 U.S. 341, 347, 348:

[100]

For convenient reference, § 5219 is set out in pertinent part, as follows:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

"(b) In the case of a tax on said shares the tax imposed

"* * * The **purpose** of the restriction is to render it impossible for any state, in taxing the shares [national banking stock], **to create and foster an unequal and unfriendly competition** with national banks, by favoring shareholders in state banks or individuals interested in private banking or engaged in operations and investments normal to common to the business of banking. [Cases Cited]"

"* * * The restriction is not intended to exact mathematical equality in the taxing of national bank shares and such other moneyed capital, **nor to do more than require such practical equality as is reasonably attainable in view of the differing situations of such properties.** But every clear discrimination against national bank shares and in favor of **a relatively material part of other moneyed capital employed in substantial competition with national banks** is a violation of both the letter and spirit of the restriction. [Cases Cited]" (Emphasis added)

This purpose was affirmed in

First National Bank v. *Hartford*, *supra* (1927) 273 U.S. 548

in the following language:

"shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: Provided, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section." (R.S. § 5219; Mar. 4, 1923, ch. 267, 42 Stat. 1499; May 25, 1926, ch. 88, 44 Stat. 223; 12 U.S.C. 548.)

"• • • It [§ 5219] was intended to prevent the **fostering of unequal competition** with the business of national banks by the aid of discriminatory taxation in favor of capital invested in institutions or individuals engaged either in similar businesses or in particular operations or investments like those of national banks. [Citing *Mercantile Bank* v. *New York*, 121 U.S. 138, 155] • • •." (Emphasis and bracketed material added)

First National Bank of Guthrie Center v. *Anderson, County Auditor, et al.*, *supra*, 269 U.S. 341,

and the cases analyzed therein indicate authoritatively that the term "other moneyed capital," as used in § 5219, includes only moneyed capital "which is employed in such a way as to bring it into substantial competition with the business of national banks."

As stated in

First National Bank of Hartford v. *Hartford*, *supra*, (1927) 273 U.S. 548,

the issue of "substantial competition" is a mixed question of fact and of law. The statute must be applied to the facts in hand in order to determine whether

"• • • the particular moneyed capital and the particular competition with which we are here concerned are moneyed capital and competition within the spirit and purpose of the statute. • • •",

It is respectfully submitted that this Court has never taken the mechanical approach to the application of § 5219, contended for by the appellant. It has examined the taxing system of a particular state to see whether it "create[s]

and foster[s] an unequal and unfriendly competition" with the national banks and to determine whether there is such "practical equality" in the treatment of national bank shares and other moneyed capital "as is reasonably attainable in view of the differing situations of such properties."

This Court's interpretation of § 5219, referred to above and set forth lucidly in *First National Bank of Guthrie Center* v. *Anderson, County Auditor, et al., supra*, (1926) 269 U.S. 341, clearly protects national bank stockholders and the business of national banks from unequal, unfriendly or discriminatory tax treatment; answers many of the practical problems raised by appellant's mechanical application of the *Hartford* case, *supra*, to the circumstances of this case; and achieves a harmony among the many decisions of this Court involving § 5219. Contrary to the appellant's contention, the exemption or preferential tax treatment of some moneyed capital for just reason does not violate § 5219 so long as such exemption, in the language of the *Guthrie Center* decision, does not "create and foster an unequal and unfriendly competition with national banks." (269 U.S. 341, 347)

Furthermore, it allows the states to tax different species of property (in the instant case, the savings share account and national bank stock) differently for tax purposes if such different treatment achieves practical equality and does not "create and foster an unequal and unfriendly competition with national banks."

Such an interpretation of § 5219 opens up to inquiry and appraisal the nature, purpose and character of allegedly competing institutions or allegedly competing other moneyed capital for the purpose of resolving the mixed questions of fact and law as to "substantial competition" and "discrimination against national bank shares and in favor

of a relatively material part of other moneyed capital employed in substantial competition with national banks."

Beyond alleging that "tax discrimination" exists, appellant has made no showing that Michigan's tax treatment creates or fosters an unequal and unfriendly competition between it and the savings and loan associations, or that such treatment favors investment in savings and loan share accounts to the detriment of investments in national bank stock. Rather, the appellant rests its case entirely upon (1) a superficial and mechanical comparison of the **rate** imposed on national bank stock, measured by capital account, and the rate imposed on savings and loan association savings shares, and (2) the fact that both institutions are involved in the residential mortgage business.

It portrays the "factual" competition in terms of involvement of both types of institutions in the residential mortgage business. Ultimately, the appellant completely disregards the "law" of competition or discrimination by failing to give any effect whatever to the fact that in the residential mortgage business it employs its deposit moneys (not its "capital", as defined by appellant), while the savings and loan associations employ their savings share accounts.

The appellant considers irrelevant the practical, operative effect and economic equivalence of the taxes imposed on savings and loan associations and their share accounts on the one hand and of the tax imposed on the banking associations and their stock on the other hand. Furthermore, appellant considers immaterial the differences in the nature, character, purposes, and financial structure of savings and loan associations and of national banking associations, and yet argues extensively that savings and loan associations have changed in these particulars.

Appellees insist at this point that § 5219 was enacted by Congress to protect investors in national bank stock from unequal competition, fathered or fostered by tax discrimination; and that the appellant has not made out a case because it has not alleged or established discrimination which results in unequal competition. Thus, the existence or lack of actual tax discrimination, the applicability of the **partial exemption** rule, or the presence or absence of "substantial competition" within the purview of § 5219 at this point is immaterial. Further, appellant's case is concerned solely with the question of **partial** exemption, discrimination and competition relative to savings and loan association share accounts and it has not established that savings and loan share accounts constitute "a relatively material part of other moneyed capital employed in substantial competition with national banks." (*First National Bank of Guthrie Center v. Anderson, County Auditor, et al., supra*, (1926) 269 U.S. 341, 348). **As an initial proposition, appellant has not brought its case within the "relatively material part" requirement of § 5219.**

Even if it be assumed that appellant has stated a judicially cognizable case to be resolved by application of § 5219, the effect of such application is clear. Michigan's tax treatment of savings and loan associations does not invalidate the share tax on appellant's stock for this Court and Congress have made it abundantly clear that a share tax on national banks is not invalidated by application of § 5219 simply because some moneyed capital is exempt, and that institutions such as mutual savings banks, savings and loan associations, and other mutual thrift institutions, do not individually constitute other moneyed capital employed in substantial competition with the business of national banking associations.

1.

THE MICHIGAN TAX STRUCTURE DOES NOT DISCRIMINATE AGAINST INVESTORS IN SHARES OF NATIONAL BANK STOCK WITHIN THE MEANING OF § 5219 BY THE METHODS EMPLOYED TO TAX SAVINGS SHARE ACCOUNTS IN SAVINGS AND LOAN ASSOCIATIONS AND NATIONAL BANK STOCK. (This is a summary of argument presented on 96-116, *infra.*)

In reference to the question of discrimination, the Michigan Supreme Court found:

> "The record establishes that there was practical equality of the total tax imposed upon building and loan associations and upon national banks, * * *." (R. 1358)

This conclusion is in accord with the position taken by the Michigan Bankers Association in this cause as expressed in its brief amicus curiae (R. 1336-1337) and as further amplified in the Association's Legal Bulletin No. 2395 of July 2, 1959. It is **not** controverted by the appellant. Appellant simply urges that Michigan is required to impose the same **rate** of tax on a savings and loan share account (or a deposit in a savings bank (Br. 58)) as it does on a share of bank stock (Br. 47-52).

It is submitted that appellant's mechanical comparison—measurement by rate alone—is not an application of § 5219,[101] since only those discriminations which result in

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[101]

Uncontroverted testimony establishes appellant's comparison as "completely absurd" because

> "* * * *It ignores the economic realities of the businesses of the*

unequal and unfriendly competition are prohibited by § 5219. To this end, a long and consistent line of decisions under § 5219 develop the proposition that it is the **effect** of the tax, not its **rate**, which is controlling.

People v. *Weaver*, (1879) 100 U.S. 539

First National Bank v. *Hartford*, *supra*, (1927) 273 U.S. 548, 560, 561

First National Bank of Guthrie Center v. *Anderson, County Auditor, et al.*, *supra*, (1926) 269 U.S. 341, 347, 348

Tradesmen's National Bank of Oklahoma City v. *Oklahoma Tax Commission*, (1940) 309 U.S. 560, 567

Hepburn v. *School Directors*, (1874) 23 Wall (90 U.S.) 480, 485

Davenport Bank v. *Davenport*, 123 U.S. 83

Amoskeag Savings Bank v. *Purdy*, (1913) 231 U.S. 373

Bank of Redemption v. *Boston*, (1888) 125 U.S. 60

Woosley, State Taxation of Banks [Chapel Hill, The University of North Carolina Press (1935)], p. 24

Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 31 *Harvard Law Review*, 321, 367

This Court held in *People* v. *Weaver*, *supra*, that § 5219 was concerned with the actual incidence and practical bur-

*two institutions and rests on the superficiality that [a] savings and loan share account is legally an equity rather than a deposit debt and being an equity share is comparable to shares of national bank stock. * * *"* (R. 861a) (Emphasis supplied)

den of the tax. Professor Powell, in 31 *Harvard Law Review*, *supra*, 321, 367, concludes that where there is in fact no substantial economic discrimination it would be absurd to insist that § 5219 has been violated. In the *Hartford* case, *supra*, this Court noted that "no question of the possible equivalence of the two schemes of taxation is presented," (273 U.S. 548, 552) and then referred to "taxing measures which by their necessary operation and effect discriminate against capital invested in national bank shares" (273 U.S. 548, 560), and to the requirement of "approximate equality in taxation" (273 U.S. 548, 556). Professor Woosley, in *State Taxation of Banks*, says at p 24, that the § 5219 rate of taxation

> "* * * must refer to 'the actual incidence and practical burden of the tax upon the taxpayer.'* * *"

In the *Tradesmen's National Bank* case [309 U.S. 560] *supra*, this Court, at p 567, referred to § 5219 as prohibiting only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class and concluded:

> "* * * Thus, it is not a valid objection to a tax on national bank shares that other moneyed capital in the state or shares of state banks are taxed at a different rate * * * unless it appears that the difference in treatment *results in fact in a discrimination unfavorable to the holders of shares of national banks.* (Cases cited)" (Emphasis ours)

In *Hepburn* v. *School Directors*, *supra*, (1874) 23 Wall (90 U.S.) 480, 485, in attempting to equate the tax burden of a mutual savings bank to the tax burden on national bank stock, it was noted that the competitive question taxwise was the amount of money that could be placed at

interest by mutual savings banks or national banks; that it was a valid inquiry, to determine how many dollars a dollar value of bank stock commanded in the investment field as compared to a deposit share of a mutual savings bank; and concluded that

> • • • *Therefore, some plan must be devised to ascertain what amount of money at interest is actually represented by a share of stock.* • • •" (Emphasis added)

The clear import of these authorities is that only when a state tax structure has the effect of placing an investment in a share of national bank stock at a competitive disadvantage is there any tax discrimination within the purview of § 5219. This is in perfect harmony with the purpose of the § 5219 restrictions.

This concept of discrimination was specifically employed by this Court in three cases dealing with the application of § 5219 to savings banks:

> *Davenport Bank* v. *Davenport*, *supra*, 123 U.S. 83,
>
> *Amoskeag Savings Bank* v. *Purdy*, *supra*, (1913) 231 U.S. 373, and
>
> *Bank of Redemption* v. *Boston*, *supra*, (1888) 125 U.S. 60.

The *Davenport* case, *supra*, held that a tax upon the paid-up capital of savings banks was equivalent to a tax of the same rate on national bank stock. The *Amoskeag* case, *supra*, engaged the same kind of tax comparative. No discrimination was found in the *Amoskeag* case, *supra*, since the national bank share tax was measured by total capital and surplus and the tax on the savings banks was measured

by value of their surplus and undivided earnings, both taxed at the same rate. In so holding, this Court concluded that § 5219

> "* * * * does not require that the scheme of taxation shall be so arranged that the burden shall fall upon each and every shareholder alike, without distinction arising from circumstances personal to the individual." (231 U.S. 373, 393-394)

In the *Bank of Redemption* case, *supra*, (though savings banks were considered without the purview of § 5219 as a matter of law), this Court again noted the problem of finding a proper yardstick raised in the *Hepburn* case and noted that proper comparison of the mutual savings banks and national banks would be an asset-to-asset comparative, taking into consideration the deposits of national banks since they constitute employable moneyed capital and since mutual institutions such as savings banks have no stock.[102]

It is surprising to note that the mechanical comparison contended for by the appellant would also require that bank deposits be taxed at 5½ mills rather than 1/25 of one per cent (Br. 58). Thus, if a state bank had the same capital structure as the appellant (i.e., a capital account of approximately $13 million and deposits of approximately $283

[102]

Appellant asserts that *Minnesota* v. *First National Bank of St. Paul*, (1927) 273 U.S. 561, requires the comparison it contends for in this case, i.e., a mechanical comparison of the rate of tax made without determining questions of practical or economic equivalence. However, it is submitted that this Court rejected only the particular method of comparison there used and did not find any practical equivalence between a tax rate of 61½ mills on bank shares valued at 40 per cent and a tax of 3 mills per dollar on the full value of competing moneyed capital in the hands of individuals.

million), the tax would amount to approximately 125 mills upon the state bank shares.[103] Furthermore, under appellant's mechanical comparison argument, the State of Michigan would have to impose the same rate of tax on federal credit unions and other federal agencies or instrumentalities, although expressly prohibited from taxing the same by act of Congress. This but clearly demonstrates the absurdity of the appellant's position.

It is therefore respectfully submitted that so long as Michigan has imposed a tax on savings and loan association share accounts in an amount equivalent in a practical, economic sense to that imposed upon national bank stock, there is no discrimination against bank shares within the purview of § 5219. The finding of the lower courts and the uncontroverted record in this cause establish such equivalence.

2.

THE STATE OF MICHIGAN IS ENTITLED TO PREFERENTIALLY TAX SAVINGS ACCOUNTS OF SAVINGS AND LOAN ASSOCIATIONS AS COMPARED TO SHARES OF NATIONAL BANK STOCK WITHOUT VIOLATING § 5219. (This is a summary of argument presented on pp 116-168, *infra*.)

Even if we assumed the existence of significant tax discrimination, Michigan's tax treatment of savings and loan

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[103]

$$5.5 \text{ mills} + \left(\frac{\$\ 13{,}000{,}000}{\$283{,}000{,}000} \times \frac{5.5 \text{ mills}}{x} \right) = 5.5 \text{ mills} + 119.7 \text{ mills} = 125.2 \text{ mills or } 12.52\%$$

associations would not violate § 5219. The decisions of this Court interpreting and applying § 5219 clearly recognize that so long as Michigan taxes the major portion of all moneyed capital in substantial equality with bank shares, it can grant exemption or preferential treatment of the remaining portion of moneyed capital, if exemption or preference is founded on just reason and so long as such exemption or preference does not evidence an intent to create or foster a hostile or unfriendly discrimination against national banks.

This rule of "partial exemption" has been consistently applied to mutual savings banks and savings and loan associations to exclude them as a matter of law from the purview of § 5219.

The following decisions clearly establish the partial exemption rule—prescribe its limitations—and bring savings and loan associations within its scope:

People v. *Commissioners,* 4 Wall (71 U.S.) 244, 256

Hepburn v. *School Directors, supra,* (1874) 23 Wall (90 U.S.) 480, 485

Adams v. *Nashville,* (1877) 95 U.S. 19, 22

Boyer v. *Boyer,* (1885) 113 U.S. 689, 693

Mercantile Bank v. *New York;* (1887) 121 U.S. 138, 145, 161

National Bank of Wellington v. *Chapman,* 173 U.S. 205, 214

Aberdeen Bank v. *Chehalis County,* (1897) 166 U.S. 440, 460

Bell's Gap Railroad Co., v. *Pennsylvania,* 134 U.S. 232, 237

Davenport Bank v. *Davenport*, *supra*, 123 U.S. 83, 86

Bank of Redemption v. *Boston*, *supra*, 125 U.S. 60, 67-68

Mercantile National Bank v. *Hubbard*, *supra*, (1899) 98 F. 465, 471; aff'd sub nominee *Lander* v. *Mercantile National Bank*, *supra*, 186 U.S. 458

Hoenig v. *Huntington National Bank*, (1932) (C.C.A. 6th Circuit) 59 F. 2d 479; Cert. denied 287 U.S. 648

First National Bank of Shreveport v. *Louisiana Tax Commission*, (1933) 289 U.S. 60

People v. *Goldfogle*, (1924) 205 N.Y.S. 870, 123 Misc. 399 (aff'd by App. Div. 211 N.Y.S. 85)

First National Bank of Glendive v. *Dawson County*, (1923) 66 Mont. 321; 213 P. 1097

Merchants' National Bank of Glendive v. *Dawson County*, (1933) 93 Mont. 310; 19 P. 2d 892

Consolidated National Bank v. *Pima County*, 5 Ariz. 142, 48 P. 291

The leading § 5219 case of *Mercantile Bank* v. *New York*, *supra*, 121 U.S. 138, quoted and relied upon extensively in *Hartford*, *supra*, 273 U.S. 548, applied the partial exemption rule to mutual savings banks and determined that the exemption and preferential treatment accorded some moneyed capital in New York did not violate § 5219. Counsel for the *Mercantile Bank*, relying upon *Boyer* v. *Boyer*, *supra*, 113 U.S. 689, argued that the partial exemption rule was not applicable because the exemption of moneyed capital in New York was

"• • • of a 'very material part relatively' of the

whole, and renders the taxation of national bank shares void.'" [121 U.S. 138, 145]

No tax was imposed by New York on savings banks and municipal bonds. By reliance on *Hepburn* v. *School Directors, supra,* 23 Wall 480, this Court determined that § 5219 was not thereby violated and stated, at p 161:

"* * * The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon *just reasons,* and not operate as an unfriendly discrimination against investments in national bank shares. * * *" (Emphasis supplied)

The *Hartford* (273 U.S. 548) and *Boyer* (113 U.S. 689) cases, *supra,* were concerned with total exemption of moneyed capital other than that represented by bank stock and did not in any way involve or purport to overrule the partial exemption cases.

This established rule of partial exemption founded upon public policy considerations has not been altered or changed by any decisions involving § 5219. Furthermore, this judicially established rule, as applied to savings banks, was before Congress in the proceedings dealing with the 1923 amendments to § 5219. It also appears to have been recognized and applied by the Congress when it required the states to tax federal savings and loan associations under the provisions of the *Home Owners Loan Act of 1933*[104] "the same as other mutual thrift institutions."[105] It is signifi-

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[104]
June 13, 1933, ch. 64, § 1, 48 Stat. 128; 12 U.S.C. 1461, et seq.

[105]
June 13, 1933, ch. 64, § 5, 48 Stat. 132; as last amended Sept. 2, 1958, Pub. L. 85-857, § 13 (f), 72 Stat. 1264; 12 U.S.C. 1464 (h).

cant also that Congress, after creating the federal savings and loan associations under the *Home Owners Loan Act of 1933* and establishing their purpose and identity as that of a "mutual thrift institution," provided for the insurance of savings share accounts of federal and state savings and loan associations, homestead associations and cooperative banks *by the Federal Savings and Loan Insurance Corporation* legislation[106] in much the same way as it provided for the insurance of deposits in banking institutions. It is submitted that such legislation and the legislation creating and providing for the taxation of other agencies and instrumentalities involved in the home mortgage market, demonstrates a congressional recognition and affirmance of the proposition that savings and loan associations are deemed by Congress to be serving a particular public need in the thrift savings and home financing field. Furthermore, there is expressed in such legislation the intent that savings and loan associations and other like mutual institutions, such as the **national mortgage associations[107] and federal credit unions[108]** are not to be compared to national banking associations for the purpose of detemining the validity of state tax systems.

When Congress permitted the states to tax federal savings and loan associations in the same manner as they taxed other mutual thrift institutions, it provided a different rule of taxation for stock corporations having private stockholders which were competitive with the busi-

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[106]

June 27, 1934, ch. 847, title IV, § 401, 48 Stat. 1255; July 16, 1952, ch. 883, 66 Stat. 727; 12 U.S.C. § 1724 et seq.

[107]

June 27, 1934, ch. 847, title III, § 301, 48 Stat. 1252; as last amended Aug. 2, 1954, ch. 649, title II, § 201, 68 Stat. 612; 12 U.S.C. 1716, et seq.

[108]

June 26, 1934, ch. 750, § 1, 48 Stat. 1216; 12 U.S.C. 1751, et seq.

ness of National banks. Thus, in providing for the taxation of **joint stock land banks**[109] and **agricultural credit corporations**,[110] Congress, required these institutions to be taxed by the states in accordance with the restrictions contained in § 5219. We submit that the partial exemption rule not only is an established interpretation and application of § 5219 by this Court, but it is also one known and adopted by Congress and also a rule in accordance with the continuing express public policy of the Congress in the thrift savings and home finance field. *Mercantile National Bank* v. *Hubbard, supra,* (Ohio ND) 98 F. 465 (affirmed sub nominee *Lander v. Mercantile National Bank, supra,* 186 U.S. 458), first applied the partial exemption rule (previously applied to savings banks) to savings and loan associations. The Court there found no material differences between savings banks and savings and loan associations (98 F. 465, 471). This rationale constituted the basis of the decision in *Hoenig* v. *Huntington National Bank, supra,* (CCA 6) 59 F. 2d 479, certiorari denied 287 U.S. 648, since both mutual savings banks and savings and loan associations serve the same public policy, e.g., thrift savings and home-ownership. This was accepted and followed in *First National Bank of Shreveport* v. *Louisiana Tax Commission, supra,* 289 U.S. 60; by the New York courts in *People* v. *Goldfogle, supra,* 205 N.Y.S. 870, 123 Misc. 399, affirmed by App. Div., 211 N.Y.S. 85; by the Supreme Court of Montana in *First National Bank of Glendive* v. *Dawson County, supra,* 66 Mont. 321, 213 P. 1097 and in *Merchants' National Bank of Glendive* v. *Dawson County, supra,* 93 Mont. 310, 19 P. 2d 892; and by the Supreme Court of Arizona in *Consolidated National Bank* v. *Pima County, supra,* 5 Ariz. 142, 48 P. 291.

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[109]
July 17, 1916, ch. 245, title I, § 26, 39 Stat. 380; 12 U.S.C. 932.

[110]
Mar. 4, 1923, ch. 252 title II, § 211, 42 Stat. 1469; 12 U.S.C. 1261.

It is thus too late in the day for the appellant to assert that the **partial exemption** rule, as applied to mutual savings banks and savings and loan associations, is based upon superficialities in the structure or organization of such institutions or the lack of their investment activity in various phases of the banking business (*Hoenig* v. *Huntington National Bank, supra,* (C.C.A. 6) 59 F. 2d 479, certiorari denied 287 U.S. 648; and *Bank of Redemption* v. *Boston, supra,* 125 U.S. 60.

This established partial exemption rule in the savings bank cases is not dependent upon factual competition or upon details concerning the organization of mutual savings banks as compared to savings and loan associations.

The appellant, in arguing that the **partial exemption** rule is not applicable to the kind of savings and loan associations doing business in Michigan in 1952 and does not apply to the competitive situation in Michigan as pertains to national banks and to these associations, forgets that each of the cases involving the exemption or preferential treatment of mutual savings banks or savings and loan associations was litigated in an effort to distinguish previous decisions of this Court upon the theory that either the nature, character, or purpose of the institutions or their competitive position had changed. This effort was expressly referred to in *Bank of Redemption* v. *Boston, supra,* 125 U.S. 60, 67-68. Counsel in *Davenport Bank* v. *Davenport, supra,* 123 U.S. 83, argued the inapplicability of the rule pertaining to savings banks in New York, as stated in *Mercantile Bank* v. *New York, supra,* 121 U.S. 138, 160. This Court, however, in the *Davenport* and *Redemption* cases, as in *Mercantile,* in granting the partial exemption, referred not to the alleged activity of the associations, but to the nature and purpose of mutual savings banks.

In *Bank of Redemption* v. *Boston*, *supra*, 125 U.S. 60, 67-68, this Court, against argument that the Massachusetts savings banks were different from the New York savings banks in the *Mercantile* case or the Iowa banks in the *Davenport* case, again referred to the proposition that mutual savings banks **are substantially institutions organized for the purpose of investing the savings of small depositors, "which forecloses further discussion."** (125 U.S. 60, 68)

Appellant's assertion that the partial exemption rule is dependent upon the lack of **factual** competition between the moneyed capital of such institutions and that of national banking associations encounters other difficulties. It does not jibe with the language employed by this Court on numerous occasions in interpreting § 5219; it is inconsistent with congressional treatment of federal savings and loan associations by the *Home Owners' Loan Act of 1933* and various agencies and instrumentalities of the federal government that Michigan is prohibited from taxing, such as federal credit unions and national farm mortgage associations; it requires the *Hartford* case, *supra*, 273 U.S. 548, to be read as overruling the *Mercantile* case, *supra*, 121 U.S. 138; it ignores the actual proof of factual competition in some of the partial exemption cases, including *Bank of Redemption* v. *Boston*, *supra*, 125 U.S. 60, and *Hoenig* v. *Huntington National Bank*, *supra*, (C.C.A. 6th Circuit) 59 F. 2d 479.

In further attempting to circumvent the application of the **partial exemption** rule, the appellant insists that there exists no just reason for placing savings and loan associations in a special tax category. Appellant here ignores that there is an absence of any change in the basic purpose or policy served by the Michigan savings and loan associations since the adoption of Act 50 of the Michigan Public Acts of

1887. It is contrary to the fact that the federal savings and loan associations came into being in 1933 and were created for the same public policy purpose as the Michigan savings and loan associations, namely, for thrift saving and home financing purposes. The record is completely void of any showing that the character, nature and purpose of these institutions has materially changed. Furthermore, analysis of the pertinent statutory provisions controlling each institution clearly indicate that the essential nature and basic purpose of these mutual institutions is the same as it always has been — to carry out an established public policy of promoting thrift savings and home ownership.

It is eminently clear that the mutual savings bank and savings and loan association cases applying the partial exemption rule are applicable to the case at bar and dispositive of the issue here presented.

3.

THE CAPITAL OF SAVINGS AND LOAN ASSOCIATIONS, BEING CONSTITUTED OF SAVINGS SHARE ACCOUNTS, INVESTED IN THE NARROW AND RESTRICTED FIELD OF FIRST MORTGAGE HOME FINANCING, IS NOT IN "SUBSTANTIAL COMPETITION" WITH THE CAPITAL OF NATIONAL BANKS WITHIN THE PURVIEW OF § 5219. (This is a summary of the argument presented at pp 169-194, *infra*.)

In consistently ruling out savings and loan associations and mutual savings banks from consideration under § 5219, this Court was well aware of two things: (1) That mutual savings banks and savings and loan associations were restricted by legislation to very limited activity and were not permitted to engage in the banking business; and (2) that

they were organizations whose business was the direct and active use of the pooled funds of their members, as contrasted to national banks which, being commercial profit stock corporations, utilized moneys from sources other than their investors to carry on their general banking business. *First National Bank of Shreveport* v. *Louisiana Tax Commission, supra,* (1933) 289 U.S. 60-64.

Appellant insists that there exists a keen competition for residential mortgages, in which the appellant invests its deposit money, savings and loan associations their savings share accounts. This deposit money is not the "capital" of appellant within § 5219. Appellant is a stock company while savings and loan associations are nonstock mutual institutions.

How can fundamentally different institutions be said to be in "substantial competition" within the meaning of § 5219? How can a nonstock entity that cannot accept deposits compete with the capitalized stock corporation in the latter's employment of deposit moneys?

Appellant does not attempt to answer these questions but **assumes** that savings and loan associations are in **substantial competition** with national banks because both institutions operate in the home financing field and they compete for savings deposit money. Appellant derives this erroneous assumption from the fact that it employs a part of its assets (a portion of its deposit moneys) in the home financing field, traditionally engaged in by savings and loan associations. In support of this assumption it points to the substantial growth of savings and loan associations but declines mention of the rapidity and extensiveness of its own growth.[111]

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[111]
Appellant bank grew from $67,601,000 in 1941 to about $309,000,000

Appellant thus poses the issue of "substantial competition" as pertaining only to the flow of investment money in areas competitive with the business of national banks. It urges this Court to conclude that there is substantial competition within the purview of § 5219 if a substantial amount of moneyed capital as compared to the capital account of the appellant bank is invested in a segment of the banking business (the bank's use of deposit money in home financing) (Br. 9-18).

Appellant's position completely ignores the established rule that substantial competition with the business of national banks presents a mixed question of fact and — law. *First National Bank* v. *Hartford, supra,* (1927) 273 U.S. 548, 552.

Assuming discriminatory taxation of bank shares (discriminatory in effect and in fact — not merely in rate), and further assuming the factual presence of competition substantial in amount but not of the kind or quality which is hostile and unfriendly toward national banks, the business of national banks, or the owners of national bank stock, such competition is unsubstantial as a matter of law. It does not jeopardize or injure the national banking system, and § 5219, specifically enacted for the protection of that system, is not therewith concerned.

Clearly, "substantial competition" does not mean competition, however keen or large in amount, with a limited segment of the national banking business. It means competition, of a serious character, with the major or characteristic functions of the national banking business. This

in 1952 and approximately $442,000,000 in 1956, or 4½ times its original size in the 11-year interval between 1941 and 1952 and 6½ times its original size in the 15-year interval between 1941 and 1956. (Df. Ex. 202; R. 672a, 1318a-1319a).

interpretation and application of "substantial competition" has been the concern of this Court and others in deciding the § 5219 cases. Viewing "substantial competition" in this light, it is of course necessary to examine and ascertain the nature and character of the institutions competing, as well as the employment of their capital, to see what phases of the business of national banks could be adversely affected if such moneyed capital were tax exempt or taxed at a lower rate than national bank stock. This was well recognized by this Court in the *Shreveport* case [289 U.S. 60], *supra*, where its realistic approach to this problem resulted in a holding that because savings and loan associations were not comparable to, and were of a completely different character than, national banking associations, as a matter of law they could not be in substantial competition.

In the case at bar, the Michigan Supreme Court specifically found:

> "The record in this appeal discloses that Michigan building and loan associations operated in a narrow, restricted field, are markedly different in character, purpose and organization from national banks, and are not in 'substantial competition' with national banks." (R. 1358)

Even if substantial competition between savings and loan associations (or other mutual thrift institutions) and national banking associations could pose a purely factual question, the facts in this cause still do not establish such competition. This is particularly true if appellant's interpretation of the *Hoenig* case [59 F. 2d 479], *supra*, is adopted, i.e., that there was a lack of factual competition because of the difference between the savings and loan

associations of Ohio in 1926 and the national banking associations of that day.[112]

Substantial competition as a factual proposition was further found **not** to exist by the appellees' expert witness in banking and finance, for the business of the appellant national bank and other banking associations in 1952 did not sufficiently overlap or compete with the business of savings and loan associations. (R. 854a-855a)[113]

In reference to "substantial competition," again the appellant urges as immaterial all questions concerning the nature or character of the allegedly competing moneyed

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[112]

This is clearly indicated by an analysis of the *Hoenig* "facts," infra, pp 142-147 and Addendum A, p 211.

[113]

Appellees' expert witness testified that savings and loan associations and national banks, in a factual, economic sense, were not in substantial competition within the purview of § 5219. He based this conclusion upon the fact that the two types of institutions were not comparable; that each was involved in a different phase of the financial business; that residential real estate loans of national banks represented only 20 per cent of their total assets while such loans represented almost all the assets of the savings and loan associations; that national banking associations loaned deposit moneys in the residential mortgage field while savings and loan associations loaned savings share account moneys; that national banks concentrated in the F.H.A. and V.A. mortgage field because of liquidity requirements while four-fifths of the savings and loan mortgages were of the conventional type, with a longer maturity or for a larger amount than permitted by many national banks; that national banks loaned a portion of their deposit moneys in the residential mortgage field while savings and loan associations could not accept deposits; that the purpose and function of national banks and of savings and loan associations were too different and their area of common operations too narrow to permit substantial competition in an economic sense.

capital and the institutions employing the same. If such considerations were immaterial, bank deposits and the funds and stock of various agencies and instrumentalities of the United States government expressly exempt from state taxation would have to be considered as employed in substantial competition with the business of appellant and other national banking associations. **As to its own deposits, appellant would be in substantial competition with itself.**

This but emphasizes this Court's wisdom in the *Hartford* case [273 U.S. 548], *supra*, when it said that the question of substantial competition is a mixed one of both fact and law.

In light of the above, it is clear that the appellant has not made out a case of substantial competition.[114]

4.

APPELLANT HAS FAILED TO MEET ITS DISTINCT BURDEN OF ESTABLISHING BY CLEAR AND COGENT EVIDENCE AND AUTHORITY THAT ACT 9 OF THE MICHIGAN PUBLIC ACTS OF 1953, TO THE EXTENT IT SUBJECTS APPELLANT'S STOCK TO TAXATION, IS UNCONSTITUTIONAL. This is a summary of the argument presented at pp 93-96, *infra*.

This Court hesitates to declare state legislation unconstitutional. In reviewing cases dealing with state taxation,

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[114] As a factual proposition, appellant has not established that the capital of savings and loan associations in Michigan constitutes a relatively material part of the capital employed in competition with the business of banking in Michgan. This, alone, disposes of "substantial competition."

it has constantly recognized the necessity of state systems of taxation and the need of state revenues to assure proper discharge of governmental functions. A primary purpose of § 5219, which allows the states to tax national bank shares, demonstrates congressional recognition of state revenue demands.

That appellant must prove its claim of unconstitutionality is clear. The Michigan Supreme Court below stated:

> "Appellant, as a taxpayer claiming immunity from the tax, had the burden of establishing its right to the exemption. There is no presumption of unlawful discrimination or that Michigan PA 1953, No. 9, imposed a tax 'at a greater rate than [was] assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks.' To meet this test, appellant had to introduce proof that was 'manifest.' (See *Hepburn v. School Directors*, 23 Wall [640] [90 U.S.] 480 [23 L ed 112], and *Norton Company v. Department of Revenue of Illinois*, 340 U.S. 534 [71 S Ct 377, 95 L ed 517].) Plaintiff failed to meet this burden of proof." (R. 1358-1359)

Though appellant urges that the result it is seeking in this cause is "tax equality" with its competitors, it is in fact asking that the only tax imposed upon its business be declared unconstitutional by this Court. If "tax equality" were its sole concern, the appellant would not raise its voice in protest of Act 9 of the Michigan Public Acts of 1953, since this statute was enacted to achieve a realistic and practical "tax equality" among Michigan financial institutions. This it did! Does appellant absent-mindedly call for the garment it wears?

THE ARGUMENT

1.

THE PURPOSE OF § 5219

Mercantile National Bank v. *New York, supra,* (1887) 121 U.S. 138,

is considered the leading § 5219 share tax case. This Court there stated at pp 154-155:

> "The key to the proper interpretation of the act of Congress is its policy and purpose. The object of the law was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the Treasury of the United States. The capital of each of the banks in this system was to be furnished entirely by private individuals; but, for the protection of the government and the people, it was required that this capital, so far as it was the security for its circulating notes, should be invested in the bonds of the United States. These bonds were not subjects of taxation; and neither the banks themselves, nor their capital, however invested, nor the shares of stock therein held by individuals, could be taxed by the States in which they were located without the consent of Congress, being exempted from the power of the States in this respect, because these banks were means and agencies established by Congress in execution of the powers of the government of the United States. It was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the States the authority to tax them within the limits of a rule prescribed by the law. *In fixing those limits it became*

necessary to prohibit the States from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote. The business of banking, including all the operations which distinguish it, might be carried on under state laws, either by corporations or private persons, and capital in the form of money might be invested and employed by individual citizens *in many single and separate operations forming substantial parts of the business of banking. A tax upon the money of individuals, invested in the form of shares of stock in national banks, would diminish their value as an investment and drive the capital so invested from this employment, if at the same time similar investments and similar employments under the authority of state laws were exempt from an equal burden. The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition,* by favoring institutions or individuals carrying on a similar business and operations and investments of a like character.[1115] The language of the act of Congress

[1115]

This sentence is repeated in 51 Am. Jur., Taxation, § 269, and cited in support thereof are:

First Nat. Bank v. *Hartford, supra,* 273 U.S. 548

First Nat. Bank of Guthrie Center v. *Anderson, supra,* (1926) 269 U.S. 341

Des Moines Nat. Bank v. *Fairweather,* 263 U.S. 103

National Bank of Wellington v. *Chapman, supra* 173 U.S. 205

Talbott v. *Silver Bow County,* 139 U.S. 438

Palmer v. *McMahon,* 133 U.S. 660

Stanley v. *Albany County,* 121 U.S. 535

Mercantile Nat. Bank v. *New York, supra,* (1887) 121 U.S. 138

is to be read in the light of this policy." (Emphasis added) [Quoted in *Amoskeag Savings Bank* v. *Purdy*, *supra*, (1913) 231 U.S. 373]

The purpose of § 5219 as stated in the *Mercantile* case, *supra*, has been consistently followed and given expression by this Court in numerous cases, including *First National Bank of Guthrie Center* v. *Anderson, County Auditor, et al.*, *supra*, 269 U.S. 341 (decided subsequent to the 1923 amendment excluding personal investments by individual citizens not engaged in the banking or investment business). In the *Guthrie Center* case, this Court held that the proviso added to the share tax provision of § 5219 in 1923 (History of § 5219, *supra*, p. 23) did not change the meaning of that section as previously interpreted by decisions of this Court. The effect of the 1923 amendment was stated as follows in the *Guthrie Center* case, *supra*, at 269 U.S. 341, 350:

"• • • In *Mercantile National Bank* v. *New York*, *supra*, where the terms and purpose of the restriction [§ 5219] were much considered, it was distinctly held that the words 'other moneyed capital' must be taken as impliedly limited to capital employed in **substantial competition with the business of national banks.** In later cases that definition was accepted and given effect as if written into the restriction. It, of course, would exclude bonds, notes or other evidences of indebtedness when held merely as personal investments by individual citizens not engaged in the banking or investment business, for capital represented by this class of investments is not employed in substantial competi-

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Boyer v. *Boyer*, *supra*, 113 U.S. 689

H.A.S. Loan Service v. *McColgan*, 21 Cal. (2d) 518, 133 P. (2d) 391, 145 A.L.R. 349

McHenry v. *Downer*, 116 Cal. 20, 47 P. 779, 45 L.R.A. 737

tion with the business of national banks. Thus in legal contemplation and practical effect the restriction was the same before the reenactment as after. * * *" (Emphasis and bracketed material added)

2.

THE APPELLANT HAS THE BURDEN OF ESTABLISHING BY CLEAR AND COGENT EVIDENCE THAT ACT NO. 9, MICHIGAN PUBLIC ACTS OF 1953, TO THE EXTENT IT SUBJECTS APPELLANT'S STOCK TO TAXATION, IS INVALIDATED BY § 5219.

It is axiomatic that a plaintiff must prove its case and that this Court is not prone to declare state taxing statutes unconstitutional.

Norton Co. v. Department of Revenue, 340 U.S. 534:

"* * * The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption.[116]

Allegations of competition or discrimination or substantiality of either is not sufficient. It is incumbent upon appellant to meet each factual requirement of § 5219 by cogent, convincing and competent evidence.

The nature of the specific burden of proof imposed on appellant by the requirements of § 5219 is illustrated by the following decisions:

[116] *Compania General* v. *Collector*, 279 U.S. 306.

First National Bank of Shreveport v. *Louisiana Tax Commission, supra*, (1933) 289 U.S. 60

Georgetown National Bank v. *McFarland*, (1927) 273 U.S. 568

Hills v. Exchange Bank, (1881) 105 U.S. 310

Aberdeen v. *Chehalis County, supra*, (1897) 166 U.S. 440

Bank of Commerce v. *Seattle*, (1897) 166 U.S. 463

Amoskeag Savings Bank v. *Purdy, supra*, (1913) 231 U.S. 373

Commercial Bank v. *Chambers*, (1901) 182 U.S. 556

The appellant has the distinct burden of proving:

(1) That the "capital" (savings share accounts) of savings and loan associations is "other moneyed capital";

(2) That the "capital" of savings and loan associations employed in competition with appellant represents a relatively material part of "other moneyed capital" employed in competition with the business of national banks;

(3) That a substantial amount of this "other moneyed capital" is employed in **substantial** competition with the business of national banks;

(4) That the tax imposed upon national bank shares in its practical operation and effect discriminates against national bank share capital and in favor of a relatively material part of "other moneyed capital" employed in substantial competition with the national banks and thereby creates an unfriendly and unequal competition against investors in national bank stock;

(5) That an interest of an individual in his savings share account in a savings and loan association is more than a personal investment and that it is employed by him in substantial competition with the banking or investment business;

(6) That the exemption or preferential treatment of the alleged competitive moneyed capital is not in accordance with established public policy and is thus in conflict with the spirit and purpose of § 5219.

The purpose of § 5219 is to protect solely investors in national bank shares and thus the business of national banks from unequal and unfriendly competition. Only to this end were states prohibited from imposing discriminatory taxation on national bank stock in favor of a relatively material part of other moneyed capital in substantial competition with the business of national banks.

Appellant has produced no evidence that the tax discrimination it here complains of has the practical operation and effect of discriminating against investors in national bank shares by creating unfriendly and unequal competition against investments in national bank shares. Since admittedly economic and competitive equivalents are being subjected to equivalent taxation, there cannot be discrimination within the meaning, purpose and purview of § 5219. On this point alone the appellant has not brought its case within the restrictions of § 5219.

3.

THE MICHIGAN TAX STRUCTURE DOES NOT DISCRIMINATE AGAINST NATIONAL BANK STOCK WITHIN THE MEANING OF SECTION 5219.

A. Introductory Considerations

The question of discrimination within the purview of § 5219 is closely related to the purpose sought to be accomplished by Congress in enacting § 5219. In fact, the question of discrimination within the meaning of § 5219 cannot logically be isolated from the other tests employed in determining the validity of a share-tax permitted by § 5219. If savings and loan associations may be exempted or preferred tax-wise under the **partial exemption** rule based on public policy (*infra*, pp 116-138) or on Congressional manifestation of intent in pari materia legislation (*infra*, pp 155-168); there cannot be substantial competition by such loan associations (*infra*, pp 169-194) within the purview of § 5219, and neither can there be discrimination within the meaning of § 5219.

It is the appellees' position that, as a matter of law, discrimination cannot exist within the meaning of § 5219, inasmuch as savings and loan associations are entitled to exemption under the **partial exemption** rule and, therefore, cannot be in "substantial competition with the business of national banks."

Assuming, however, for the sake of an argument, that the state of Michigan is required to tax savings and loan associations equivalently to national banks, what would be the tests to apply in determining such an equivalence?

In answer, we must first inquire: What are the re-

quirements of § 5219 in regard to the tax comparison of these two distinctly different types of institutions that were subjected to various different taxes under the state's tax structure in 1952?

B. Discrimination within the meaning of § 5219 is only that discrimination which, in practical operation and effect, fosters and creates an unequal and unfriendly competition with the business of national banks and thereby results in the imposition of a genuine economic detriment to an investment in national bank stock.

Clearly, the intent of Congress is to protect investments in national bank stock and to that end the restrictions in § 5219 were prescribed. This Court has consistently recognized this and therefore has framed the issue of discrimination to be a determination of whether the tax structure of a state patronizes a relatively material part of other moneyed capital coming into substantial competition with the business of national banks, the practical operation and effect of such patronage being to create an unfriendly and unequal competition between investments in other moneyed capital and that of national banking stock.

Notwithstanding this, the appellant urges that the only test of equivalent tax burden is the **rate** of the intangibles tax imposed upon its stock measured by its capital account (**not market value**), as compared to the **rate** on a savings share account measured by withdrawal value plus an aliquot part of the legal reserves and undivided profits (Br. 47-51).

It must be appreciated at the outset, appellant's insistence to the contrary (Br. 47-52), that a share tax per-

mitted by § 5219 is not measured by **rate** alone. A long and consistent line of decisions under § 5219 developed the proposition that it is the **effect** of the tax, not merely its **rate**, which is controlling. This was recognized in

People v. Weaver, supra, (1879) 100 U.S. 539.

In that case, the plaintiff successfully insisted that § 5219 searches out the **actual incidence** and the **practical burden** of the tax on the taxpayer. This has been the settled construction of § 5219.

Iowa-DesMoines National Bank v. *Bennett,* (1931) 284 U.S. 239

Amoskeag Savings Bank v. *Purdy, supra,* (1913) 231 U.S. 373

This Court considered very carefully the question of discrimination under § 5219 in

First National Bank of Guthrie Center v *Anderson, County Auditor, et al., supra,* (1926) 269 U.S. 341,

and

Tradesmen's National Bank of Oklahoma City v. *Oklahoma Tax Com., supra,* (1940) 309 U.S. 560,

and referred to the test of discrimination in

First National Bank v. *Hartford, supra,* (1927) 273 U.S. 548.

It was stated in the *Guthrie Center* case, *supra,* 269 U.S. 341, 438:

"The restriction [RS 5219] is not intended to *exact*

mathematical equality in the taxing of national bank shares and such other moneyed capital, nor to do more than require such *practical equality* as is reasonably attainable *in view of the differing situations of such properties.* But every *clear discrimination* against national bank shares and in favor of a relatively material part of other moneyed capital employed in substantial competition with national banks is a violation of both the letter and spirit of the restriction.". (Emphasis added)

The most recent case dealing with the comparatives to be used in determining discrimination under § 5219 is the case of

Tradesmen's National Bank of Oklahoma City v. *Oklahoma Tax Commission, supra,* (1940) 309 U.S. 560.

The bank there urged that the tax system was discriminatory against taxable net income of the national bank upon which an excise tax was computed because the tax base included income from federal securities, while other corporations were permitted to exclude such income in computing their taxable net income. The court rejected this claim of discrimination by reliance on the share tax decisions previously decided. This court there stated at p 567:

"A consideration of the course of judicial decision on R.S. 5219 and its predecessors can leave no doubt that the various restrictions it places on the permitted methods of taxation are designed to prohibit only *those systems of state taxation which discriminate in practical operation* against national banking associations or their shareholders as a class. Compare *First*

National Bank v. *Hartford*, 273 U.S. 548; *Amoskeag Savings Bank* v. *Purdy*, 231 U.S. 373; *Covington* v. *First National Bank*, 198 U.S. 100; *Lionberger* v. *Rouse*, 9 Wall. 468. Thus it is not a valid objection *to a tax on national bank shares* that other moneyed capital in the state or shares of state banks *are taxed at a different rate or assessed by a different method unless it appears that the difference in treatment results in fact in a discrimination unfavorable to the holders of the shares of national banks.* *Amoskeag Savings Bank* v. *Purdy*, 231 U.S. 373; *Covington* v. *First National Bank*, 198 U.S. 100. • • •" (Emphasis added, except cases)

The discrimination test referred to in the *Guthrie Center* case, *supra*, and in the *Tradesmen's National Bank* case, *supra*, is followed in the *Hartford* case, *supra*. In that case it was again noted that the discrimination question posed by § 5219 related to the **actual practical effect** of the tax burden on other moneyed capital coming into substantial competition with the business of national banks and investment in national bank stock. This Court noted in the *Hartford* decision, *supra*, that **"approximate equality in taxation"** is the principal concern of § 5219. In fact, this Court closed its decision by stating, on pp 560, 561:

"• • • But a consideration of the entire course of judicial decision on this subject can leave no doubt that state legislation and *taxing measures* which by their *necessary operation and effect discriminate* against capital invested in national bank shares in the manner described[117] are intended to be forbidden. • • •" (Emphasis added)

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[117] *State of Minnesota* v. *First National Bank of St. Paul*, (1927) 273 U.S. 561, did not alter or change the test used to deter-

Professor Woosley, in *State Taxation of Banks, supra,* at p 24, after analyzing this Court's § 5219 cases, arrives at this conclusion:

> "• • • Since the restriction in § 5219 does not require that the state shall apply the same mode of taxation to national bank shares that it applies to other property provided no injustice, inequality, or unfriendly discrimination arises therefrom, *the rate of taxation must refer to 'the actual incidence and practical burden of the tax upon the taxpayer.'* • • •" (Citing *Covington* v. *First National Bank of Covington,* 198 U.S. 100 (1905) and *Amoskeag Savings Bank* v. *Purdy* 231 U.S. 373, (1913).) (Emphasis added)

After a comparable analysis of the applicable § 5219 cases, Professor Powell, in "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 31 *Harvard. Law Review,* 321, 367, concludes:

> "• • • So long as substantially equivalent burdens are imposed on all other economic values by taxation of tangible property and of the capital and franchises of corporations, *it would be absurd* to insist that the exemption of one or more of the legal forms of property in which those values may be represented, results in taxing shares in national banks at a greater rate than that imposed on other moneyed capital. The rule of the *Mercantile Bank Case* practically comes down

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mine discrimination under § 5219, but did find that a tax rate of 67 mills in 1921 and 61½ mills in 1922 on bank shares valued at 40 per cent could not be considered the practical equivalent of a tax of 3 mills per dollar on the full valuation of competing moneyed capital in the hands of individuals. Thus, in the *Minnesota* case, *supra,* this Court rejected only the particular method of comparison used to arrive at equivalence.

to a disregard of *formal legal discrimination* where there is in fact no *substantial economic discrimination.*" (Emphasis added).

It is respectfully submitted that in line with the express purpose of § 5219, as a factual proposition in the language of this Court in *Amoskeag Savings Bank* v. *Purdy, supra,* (1913) 231 U.S. 373:

> "• • • it was incumbent upon plaintiff in error to show affirmatively that the New York [Michigan] taxation system discriminates in fact against the holders of shares in the national banks, before calling upon the courts to overthrow it; and no such showing has been made."

The appellees have produced evidence concerning the practical operation and effect of the Michigan tax structure on national bank shares and alleged competing moneyed capital in the form of savings and loan share accounts. Appellees have affirmatively established by uncontradicted testimony that the **Michigan tax structure in practical operation and effect does not discriminate** against owners of national bank stock or the business of national banks; but in fact imposes an equivalent or a heavier burden on the alleged other moneyed capital—savings and loan share accounts—employed by savings and loan associations in the residential mortgage business than it does on other moneyed capital (bank deposits) of appellant which appellant employs in the same general way. Furthermore, the methods of comparison used (in establishing that the Michigan tax structure in practical operation and effect does not discriminate against owners of national bank shares) are in accord with this Court's discussions and resolutions of the problem of comparing a mutual nonstock institution (a savings bank) with a

commercial stock company, (a national banking association).

Davenport Bank v. *Davenport, supra,* 123 U.S. 83

Amoskeag Savings Bank v. *Purdy, supra,* (1913) 231 U.S. 373

Bank of Redemption v. *Boston, supra,* (1888) 125 U.S. 60

To the same general effect is the test referred to in

Hepburn v. *School Directors, supra,* (1874) 23 Wall. (90 U.S.) 480

C. The equivalent tax burden required by § 5219 is met by an asset or a capital account comparison.

In

Hepburn v. *School Directors, supra,* (1874) 23 Wall. (90 U.S.) 480,

the Court noted the problem involved in attempting to equate the tax burden of a mutual savings bank to the tax burden on a share of bank stock. The particular problem before the Court was comparing the tax on money at interest with a tax on a share of bank stock. This Court stated as follows, in regard thereto, 23 Wall. 480, 484:

"But even if it were true that these shares can only be taxed as money at interest is, the result contended for would not necessarily follow. The money invested in a bank is not money put out at interest. The money

of the bank is so put out and the share of the shareholder represents his proportion of that money. What the amount of this share is, must, in some form, be ascertained in order to determine its taxable value. If the nominal or par value of the stock necessarily indicated this amount, there might be some propriety in making that the taxable value but, as all know, such is not the case. The available moneyed capital belonging to a bank may be diminished by losses or increased by accumulated profit. *Therefore, some plan must be devised to ascertain what amount of money at interest is actually represented by a share of stock.* • • •" (Emphasis added)

The Cases of

Davenport Bank v. *Davenport, supra,* 123 U.S. 83,

Amoskeag Savings Bank v. *Purdy, supra,* (1913) 231 U.S. 373, and

Bank of Redemption v. *Boston, supra,* (1888) 125 U.S. 60

involved the problem of comparing taxes on mutual savings banks with the share tax under § 5219. In the *Davenport* case, *supra,* the Court recognized that Congress never intended that the states "should abandon systems of taxation • • • in order to make the taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners." It held that a tax upon the paid-up capital of savings banks *was* equivalent to a tax of the same rate on national bank shares.

If we treat a tax on the reserves and undivided profits of a savings and loan association equivalent to a tax on the reserves and undivided profits of a mutual savings bank, under the express holding of the *Davenport* case, *supra,* there was *no* discrimination between banks and

savings and loan associations in Michigan in 1952. Professor Woodworth testified that this method of measuring the tax effect *on* savings and loan associations and national banks "is reasonably equitable and is also administratively practicable * * *," (R. 862a) although it had the drawback of giving tax preference to institutions with the weakest capital structure (R. 862a-863a).

In comparing the tax on mutual savings banks with the share tax on national banks, the Court in

Bank of Redemption v. *Boston, supra,* 125 U.S. 60,

indicating that the employable assets of both institutions would be a proper comparative, made the following statements at pp 66-67:

"* * * The tax on savings banks is based upon deposits merely. This is because deposits furnish the only capital which is invested and employed. The institutions themselves, although corporations, have no capital stock, and are managed by trustees, not selected by the depositors, but by public authority. The whole amount of the deposits, with the exception noted, are subjected to a tax of one-half of one per cent. On the other hand, the national banks pay a tax assessed upon the market value of the shares as personal property, upon a valuation and at a rate exactly equal to that of all other personal property subject to taxation in the State. But shares of the national banks, while they constitute the capital stock of the corporations, do not represent the whole amount of the capital actually employed by them. They have deposits, too, shown in the present record to amount, in Massachusetts, to $132,042,332. The banks are not assessed for taxation on any part of these, although these de-

> posits constitute a large part of the actual capital profitably employed by the banks in the conduct of their banking business. But it is not necessary to establish the exact equality in result of the two modes of taxation. * * *"

In

Amoskeag Savings Bank v. *Purdy, supra,* (1913) 231 U.S. 373,

the Court found that there was no discrimination in favor of savings banks as compared to owners of national bank shares. In that case, the tax on national bank shares was measured by dividing the total capital surplus of all national banks involved by the number of their shares of stock, and the tax on savings banks was measured by the value of their surplus and undivided earnings. Both were taxed at the same rate. In the *Amoskeag* case, *supra*, the Court concluded, at pp 393-394:

> "* * * The language clearly prohibits discrimination against shareholders in national banks and in favor of the shareholders of competing institutions, but it does not require that the scheme of taxation shall be so arranged that the burden shall fall upon each and every shareholder alike, without distinction arising from circumstances personal to the individual."

The combined effect of the *Davenport, Bank of Redemption, Weaver* and *Amoskeag* cases, *supra*, justifies either of two tax comparatives:

(1) Total assets of a national bank to total assets of a mutual thrift institution as inferred in the *Bank of Redemption* and *Weaver* cases, *supra*);

(2) The reserves and undivided profits of the savings and loan associations with the actual value of appellant's stock (the *Amoskeag* and *Weaver* cases, *supra*).

D. Uncontroverted evidence establishes that Michigan imposes an equivalent tax burden on national banks and savings and loan associations and that the tax burden on national banking associations does not create or foster an unequal and unfriendly competition against the business of national banks or the ownership of national bank stock.

Once it is understood that § 5219 is concerned with the practical economic impact of a state's taxation system, it then becomes important to consider the nature and amount of the total tax burden placed by a state's tax structure upon the stock of national banking associations and other moneyed capital. It is required under § 5219 **that there be a determination of the practical operation and effect of the tax structure as it relates to the alleged competitive employment of other moneyed capital and the employment of capital represented by bank stock.**

A mutual institution, such as a savings and loan association, has no capital equivalent to the capital of a national bank represented by a stockholder's interest and risk investment in a share of stock.[118] Savings and loan as-

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[118] This is substantiated by "Additional Facts as to Alleged Competition," *infra*, pp. 186-194; "Statement of Facts," *supra*, pp. 43-53; and by subdivision (a) of "Miscelloneous Considerations' entitled "A savings and loan shareholder is not a stockholder," *infra*, pp. 194-198.

sociations in Michigan do not have stockholders.[119]

The nearest equivalent to a mutual savings share of a savings and loan institution is a bank deposit.[120]

A savings and loan share account and a bank deposit have both been classified as "noncompeting moneyed capital" because they are not investments comparable to national bank stock, nor are they employed in the financial business in the same manner as the capital represented by national bank stock.

Clement National Bank v. *Vermont*, (1913) 231 U.S. 120

Hoenig v. *Huntington National Bank of Columbus*, *supra*, (1932) (C.C.A. 6th Circuit) 59 F. 2d 479; certiorari denied 287 U.S. 648

People v. *Goldfogle*, *supra*, (1924) 205 N.Y.S. 870; 123 Misc. 399, affirmed by App. Div., 211 N.Y.S. 85

Because the appellant bank competitively employed **only** deposit money in the residential mortgage field in 1952 and because the sixteen savings and loan associations em-

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[119]

The only possible exception is the reserve shares permitted by § 5 of Act No. 50, Michigan Public Acts of 1887 (Mich. Comp. Laws 1948, § 489.5; Mich. Stat. Ann. (Henderson) § 23.545). This permission to have reserve shares was utilized in a limited way in Michigan by one association in the Detroit area in 1952. The right of Michigan Associations to have reserve shares was eliminated in 1958 by Act No. 148, Michigan Public Acts of 1958.

[120]

This is illustrated by appellees' Exhibit 217 (R. 692a; 1316), distributed by the appellant bank for the obvious purpose of trying to distinguish between the two. Appellant, in fact, asserts they are both "other moneyed capital" (Br. 58).

played only savings share accounts in this field in 1952, practical tax equality in reference to competition with the national bank business requires a comparison of the impact of Michigan taxes on these two sources of "moneyed capital," namely, bank deposits versus savings share accounts. This, we submit, is the true dictate of § 5219.

As indicated under "Statutes Involved," *supra*, p. 4, Michigan subjected savings share accounts and bank deposits to an intangibles tax of 1.25 of 1 per cent. In addition, the Michigan savings and loan associations paid a franchise fee of $\frac{1}{4}$ of 1 mill measured by legal reserves and savings share accounts. **At this point it is clear that as a matter of law the tax structure in Michigan does not discriminate against national bank stockholders by fostering or creating an unequal and unfriendly competition with the business of national banks.**[121]

For completeness, appellees have developed the question of discrimination and the practical effect of the Michigan

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[121]

Rejecting the argument that Congress impliedly intended to exempt deposits, this Court held in *Clement National Bank* v. *Vermont*, *supra*, (1913) 231 U.S. 120, 135:

"* * * The objection made by the bank to the State's plan must rest not upon the mere fact that the depositors in national banks are taxed upon their credits or that they are taken out of the system of local taxation, *but upon the ground that the measure adopted is essentially inimical to national banks, frustrating the purpose of the national legislation or impairing their efficiency as federal agencies. Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283; *McClellan* v. *Chipman*, 164 U.S. 347, 357. And that, in substance, is the position taken.

"To be open to such an objection, it must appear that the scheme of taxation constitutes an injurious discrimination. * * *"

tax structure,[122] which conclusively establishes that, irrespective of what approach is used, the practical effect of the Michigan tax structure is to subject like moneyed capital similarly employed to equivalent taxation.

The appellees submitted evidence pertaining to the question of tax discrimination by the uncontroverted testimony of Mr. Carlson (R. 747a, et seq.) and Professor Woodworth (R. 803a, et seq.,) and by defendants' Exhibits 208 (R. 747a, 1270a), 208A (R. 735a, 1271a), 208B (R. 781a, 1272a), 210 (R. 803a, et seq.,) and by defendants' Exhibits 208 (R. 747a, and 226 (R. 857a, 1292a). Appellees also carefully presented the impact of the Michigan tax structure on the institutions here involved. Appellant produced no evidence to support its contention that a variance in rates on bank stock and savings and loan shares produces an unequal and unfriendly competition against owners of national bank shares or the business of national banks.

As indicated by the exhibits and as developed by the testimony of Professor Woodworth (803a, et seq.), there are several possible methods of comparing the effect of a state tax structure on these two types of unlike insti-

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[122]

Instead, appellant chooses to meet such analysis by bare repetitious assertions that a tax on the savings share accounts of a savings and loan association must be directly compared to a tax on bank shares, measured by the capital account of the bank, and that the rates on the two noncomparable species of property must be identical. Appellant ignores that the restriction of § 5219 requires such "practical equality as is reasonably attainable in view of the differing situations of such properties" [other moneyed capital]. *First National Bank of Guthrie Center* v. *Anderson, County Auditor, et al., supra,* (1926) 269 U.S. 341, 348. As to the share-to-share comparison, Professor Woodworth used the phrase, "Completely absurd." (R. 861a).

tutions. One method is the comparison of the tax effect on the total employable assets by each institution, which is a significant comparison when the alleged competition relates to the employment of assets in the real estate mortgage field. This comparative is in accord with the thinking of the Court in the *Bank of Redemption* case, *supra*, 125 US 60, 66-67. Under this comparative, as indicated by defendants' Exhibits 213 (R. 754a, 1279a) and 226 (R. 857a, 1292a), there was approximate tax equality in 1952 between the two institutions under consideration. The ratio of state and local taxes to total assets of the associations was .089. Appellant's ratio was .091. Similarly, the ratio of franchise and intangibles taxes to the assets of the two forms of institutions was .046 for the sixteen associations and .055 for the appellant bank. Another illustration of the asset-to-asset comparison is disclosed in defendants' Ex. 226. (R. 857a, 1292a) (prepared by Professor Woodworth), illustrating the proportion of the intangibles tax to the total assets of all national banks in Michigan and the proportion of the Michigan franchise tax to the total assets of all savings and loan associations. The ratios are .02459 for all Michigan national banks as against .02243 for the savings and loan associations.

The second method, specifically approved by the cases as to mutual savings banks (see p 104, *supra*), involves a comparison of the tax *impact* on the capital, surplus and undivided profits of appellant with the tax impact on all the reserves and undivided profits of the savings and loan associations in question. Taking into consideration the total taxes imposed upon each type of institution (except the unemployment and real property taxes which are imposed equally on these institutions), the resulting percent-

ages are 5.2 for savings and loan associations and 5.6 for the appellant bank.[123]

In reference to the above comparatives, it should be noted that appellees are not urging that any one of these particular comparatives constitutes the best method of equating the effect of the Michigan tax structure on these noncomparable, noncompetitive types of institutions. However, such comparative data, supported by competent testimony, indicates that the Michigan tax structure does not, by its practical operation and effect, discriminate against persons seeking to invest money in national bank stock, nor does it produce an unequal or unfriendly competition with the business of national banks (R. 856a-857a). In reference to the comparison that the appellant urges in this cause, that is, imposing an identical rate of tax on bank stock measured by capital account and on savings and loan associations' savings share accounts Professor Woodworth stated:

> "• • • in the light of the facts developed in my preceding testimony, capital, surplus and undivided profits to savings share accounts is **completely absurd. It ignores the economic realities of the businesses of the two institutions and rests on the superficiality that [a] savings and loan share account is legally an equity rather than a deposit debt and being an equity share is comparable to shares of national bank stock.** • • •" (R. 861a) (Emphasis supplied)

Professor Woodworth found that the most practical

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[123]

Computations were made from information contained in plaintiff's Ex. 3 (R. 529a, 931a-935a); defendants' Ex. 208 (R. 747a, 1270a); and 209 (R. 748a, 1273a, 1274a). On this method of comparison, see the testimony of Professor Woodworth (862a).

basis of comparison was total assets to total assets (R. 864a). In regard to this, he specifically stated:

> **"Total assets represent the principal basis of earning power and the opportunity to realize earnings in both institutions.**
>
> **"In view of the unlike character of their businesses, organizations and operations, the amount of total assets is doubtless as equitable a common denominator for tax purposes as can be developed, in my opinion."** (Emphasis supplied).
>
> **"My answer is based on the fact that we have the practical problem of taxing, the state, two financial institutions: one of them is a national bank; the other is a savings and loan association.** Their operations are, to be sure, very different. They have some things in common, but basically they are quite different.
>
> "That means that from the standpoint of justice and equity we need to pick out some basis that will more or less overlook these differences and put it in terms of, perhaps, as I mentioned in my testimony, total assets of the one compared to total assets of the other. That is what each of them works with in the beginning. Those are in dollars they are equal, they are fungible. One can use them one way, the other another. They are no more different in that sense than comparing the business of a farmer with the business of a merchant in the city.
>
> **"They both are operating with so many dollars. That is a simple basis. And I would say one reason that I prefer that basis is this unlike character of their operations. Dollars are dollars, but the activities of the sav-**

> **ings and loan associations are one thing—you might call that an apple—and the activities of the national banks might be a coconut."** (866a-867a) (Emphasis added)

Even accepting the appellant's contention that the § 5219 discrimination means a direct mechanical comparison of the **rate** of tax imposed on the **value** of appellant's capital stock with the **rate** of tax imposed on the **value** of savings share accounts, there is still no discrimination in the instant case.

An acceptable method of determining the value of shares of stock for taxation purposes is by capitalization of the earnings at a predetermined rate of return per dollar of investment. If this method is applied to the valuation of appellant's stock and the savings share accounts of the sixteen alleged competing savings and loan associations, and the same rate of return per dollar of "capital" is used, there is **no rate** discrimination as to these comparable values.

In 1952, appellant's stock, valued at its capital account of approximately $13,000,000 (R. 932a), produced approximately $4,146,000 in net income (before federal income taxes), or a return of **31.5%** (Def. Ex. 205, R. 672a, 1268a). In 1952, the sixteen savings and loan associations had a net income (before federal income taxes and deduction of dividend payments to shareholders) of approximately $4,466,000 on savings share account capital of approximately $134,000,000, or a return of **3.3%** (Def. Ex. 213, R. 754a, 1279a). Thus, on **values** comparable to that of savings and loan share accounts, the effective **rate** on appellant's capital stock is $\frac{31.5\%}{5.5 \text{ mills}} = \frac{3.3\%}{x}$ = fifty-eight-hundredths (.58) mills, instead of five and one-half (5.5)

mills, which is admittedly less than the tax **rate** of .65 mills imposed on domestic savings and loan associations; under the franchise (.25 mills) and intangibles (.40 mills) taxes, and less than the **rate** of approximately sixty eight one-hundredths (.68) mills imposed by the total Michigan tax burden (other than real property taxes) on the sixteen associations (Def. Ex. 213, R. 754a, 1279a).

Thus, comparable **rates** are imposed on comparable **values.**

The difficulty of measuring the burden or effect of the Michigan tax structure and the intangibles tax on the two types of institutions serves but to emphasize their fundamental noncomparable, noncompetitive character and nature.

Clearly, the appellant has not met the burden imposed upon it to show that the tax system in question operates as a clear discrimination against the competitive employment of its capital resources. Appellant has attempted to meet this burden by assuming that discrimination is a legal conclusion and need not be proven by facts. Yet, it is clear that no legal presumption of discrimination under § 5219 can be indulged in and that appellant must sustain its burden.

San Francisco National Bank v. *Dodge*, 197 U.S. 70

First National Bank of Guthrie Center v. *Anderson, County Auditor, et al., supra*, (1926) 269 U.S. 341

4.

DISTINCT TREATMENT OF SAVINGS AND LOAN ASSOCIATIONS FOR STATE TAXATION PURPOSES AS A MATTER OF LAW DOES NOT VIOLATE SECTION 5219.

A. BECAUSE OF THEIR CHARACTER, FUNCTION, PURPOSE AND RELATIVE SIGNIFICANCE, SAVINGS AND LOAN ASSOCIATIONS IN THE INSTANT CASE ARE EXCLUDABLE FROM CONSIDERATION UNDER § 5219.

The above stated proposition is supported by three analogous lines of reasoning, as developed in the cases granting such mutual thrift societies exempt or preferred tax status:

First: **They are unique institutions**, created to serve a particular policy in the field of thrift savings and home ownership. The states are thus entitled to give them tax preference if they so desire, without violating § 5219, notwithstanding the fact that they may employ moneyed capital in competition with some phase of the banking business. Such a **partial exemption** does not invalidate a share tax on national banks.

Second: Their fields of operation are so narrow and well defined within this public policy that they cannot be compared with banks and thus cannot be **substantial competitors** of national banks.

Third: Individuals holdings savings share accounts do not hold an equity investment; in other words, they do not employ their savings to acquire an ownership interest but merely place their savings with a mutual institution as a personal investment comparable to a time deposit in a bank.

1. The tax status in Michigan of savings and loan associations cannot invalidate the Michigan share tax on national banks under § 5219 because of the well-established rule permitting "partial exemption" of moneyed capital, even assuming a lower tax burden on such associations and that they are competitive with some phases of the business of national banks.

The cases interpreting and applying § 5219 clearly recognize that so long as Michigan taxes the major portion of all other moneyed capital in substantial equality with bank shares, the state can grant exemption or preferential treatment to the remaining portion of the total of all other moneyed capital, if based on **just reason** and not as an unfriendly or hostile discrimination against bank shares. This rule of **partial exemption** has been consistently applied to mutual savings banks and savings and loan associations to exclude them as a matter of law from the purview of § 5219.

In applying this rule of **partial exemption** to the instant case, we have to assume that all moneyed capital, except that of savings and loan associations, was taxed in Michigan on an equivalence with national bank shares, since there is no proof to the contrary. Also, since there is no proof as to how much moneyed capital in total there was in the state in 1952, there is no showing that savings and loan savings account shares are anything but a minor part of the total moneyed capital in Michigan in 1952.

Therefore, preferential treatment of savings and loan savings share accounts, if established, would still come within the well-established rule of **partial** exemption.

(a) The General Rule of Partial Exemption under § 5219 permits Michigan to exempt or preferentially

tax some moneyed capital without thereby invalidating a tax on national bank stock, so long as the exemption or preferential taxation is based on just reason and does not operate as an unfriendly discrimination against investments in national bank shares.

The rule of partial exemption was first considered in

People v. *Commissioners, supra,* 4 Wall (71 U.S.) 244.[124]

There the Court construed § 5219 to require uniformity of taxation only of taxable property and stated, at p 256:

"• • • it is known as sound policy that in every well-regulated and enlightened State or government, certain descriptions of property, and also certain institutions—such as churches, hospitals, academies, cemeteries and the like—are exempt from taxation; **but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform.**" (Emphasis added)

And as early stated in

Hepburn v. *School Directors, supra,* 23 Wall 480, 485,

wherein this court upheld exemption of all mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real estate:

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[124]

Des Moines National Bank v. *Fairweather, supra,* 263 U.S. 103, affirmed this case's holding that deduction of government bonds in the hands of private bankers did not violate § 5219 even though the value of bonds could not be deducted in valuing national bank shares.

"* * * It could not have been the intention of Congress to exempt bank shares from taxation because **some moneyed capital was exempt.** Certainly there is no presumption in favor of such an intention. To have effect it must be manifest. The affirmative of the proposition rests upon him who asserts it. * * *" (23 Wall 480, 85)[125] (Emphasis added)

As subsequently stated in

Adams v. *Nashville*, *supra*, (1877), 95 U.S. 19

at p 22, in holding that an exemption of investments in municipal bonds[126] did not violate § 5219:

"The act of Congress [§ 5219] was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than **like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property,** if the legislature chose to do so. * * * The discretionary power of the legislature of the States over all these subjects remains as it was before the act of Congress of June, 1864. The plain intention of that statute was to protect the corporations formed under its authority from unfriendly discrimination by the States in the

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[125]

The emphasized language indicates appellant's error in asserting that this case did not apply the *partial exemption* rule to "moneyed capital." (Br. 61, 62)

[126]

Clearly this is "moneyed capital" as defined by this Court and thus appellant's effort to distinguish this case is of no avail (Br. 61-63).

exercise of their taxing power. * * *"[127] (Emphasis added)

In the wake of these early cases, the question was posed as to how far the state could go in granting exemptions, since, in theory, they could exempt all other moneyed capital and thus create a hostile and unfriendly discrimination against the banks. This result was technically justified by the power of the legislature to grant exemptions.

In *Boyer* v. *Boyer, supra,* (1885) 113 U.S. 689, this Court was faced with the rule of law established in cases such as *Hepburn* v. *School Directors, supra,* (1874) 23 Wall 480, and *Adams* v. *Nashville, supra,* (1877) 95 U.S. 19.

In the *Boyer* case, *supra,* Pennsylvania exempted from local taxation railroad securities; shares of stock held by corporations that were liable to pay certain taxes to the state; mortgages; judgments; recognizances; money due on contracts for the sale of real estate; and loans by corporations which were taxable for state purposes. The court concluded that **the exemption was so broad** that the Pennsylvania statute **discriminated** against capital invested in shares of national banks and, therefore, was inconsistent with § 5219. Distinguishing *Hepburn* v. *School Directors, supra,* 23 Wall 480, this Court stated at p 693:

"* * * What the court had to decide, and all that

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[127]

This is further illustrated by *Lionberger* v. *Rowse,* (1869) 9 Wall (76 U.S.) 468, where the court upheld the tax on national bank shares even though the shares of two state banks were taxed at a much lesser rate because of special charter provisions that the state could not change. This further illustrates appellant's error, in asserting the "partial exemption rule" does not apply to Competing Moneyed Capital (Br. 61-62).

it did decide, was whether the exemption from local taxation of mortgages, judgments, recognizances, and money due upon agreements for the sale of real estate, in the hands of individuals, **was a partial exemption only**; that is, whether it was so **substantial in its nature and operations** as to affect the **integrity of the general assessment for local purposes.** * * * **That case is authority for the proposition that a partial exemption by a State, for local purposes, of moneyed capital in the hands of individual citizens does not, of itself and without reference to the aggregate amount of moneyed capital not so exempted, establish the right to a similar exemption in favor of national bank shares held by persons within the same jurisdiction.** * * *" (Emphasis added)[128]

The *Boyer* case is similar to earlier cases such as *Evansville Bank v. Britton*, (1881) 105 U.S. 322, where a tax on national bank shares was held invalid because debts were permitted to be deducted from credits by individuals and not by the banks. Two judges dissented on the ground that this constituted only one of a number of kinds of "moneyed capital" and thus the **partial exemption** rule was applicable. Such cases clearly illustrate that this rule was not restricted to the tax rate on noncompeting moneyed capital, or property not classified as "moneyed capital" as urged by the appellant in its brief in this cause (Br 61-62).

Encouraged by success in *Boyer* v. *Boyer, supra*, 113 U.S. 689, New York City bankers engaged the successful

[128]

As indicated above in the "Statement of Facts," p. 40, the appellant has failed to establish that the alleged competing "other moneyed capital" of the savings and loan associations in its competitive area or in Michigan is a material part of the total of such capital employed in such area.

counsel in the *Boyer case* to test the New York law.[129] This resulted in

Mercantile National Bank v. *New York, supra,* (1887) 121 U.S. 138,

which is the leading case interpreting § 5219. This Court there found that the exemption or preferential treatment accorded **some** moneyed capital in New York did not violate § 5219.

The issue was stated as follows at p 145:

> "The proposition which the appellant seeks to establish is that the State of New York, in seeking to tax national bank shares, has not complied with the condition contained in section 5219 * * * 'in that it has by its legislation expressly exempted from all taxes in the hands of the individual citizens numerous species of moneyed capital, aggregating in actual value the sum of $1,686,000,000, whilst it has by its laws subjected national bank shares in the hands of individual holders thereof (aggregating a par value of $83,000,000), and state bank shares (having a like value of $22,815,700), to taxation upon their full actual value, less only a proportionate amount of the real estate owned by the bank.' This exemption, it is claimed, is of a **'very material part relatively' of the whole, and renders the taxation of national bank shares void.**" (Emphasis added)

The court found that no tax was imposed on savings banks

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[129] Woosley; "State Taxation of Banks" (University of North Carolina Press, 1935), p. 30.

and municipal bonds. By reliance on *Hepburn* v. *School Directors, supra*, (1874) 23 Wall (90 U.S.) 480, it determined that § 5219 was not violated by state exemption of the same for public policy reasons. As stated at p 161:

> "• • • The only limitation, upon deliberate reflection, we now think it necessary to add, is that these exemptions should be founded upon **just reason**, and not operate as an **unfriendly discrimination** against investments in national bank shares. However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings banks as now organized, **which the policy of the state exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks**, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens **otherwise** subject to taxation." (*Mercantile Bank* v. *New York, supra*, 121 U.S. 138, at p 161) (Emphasis added)

To the same effect:

National Bank of Wellington v. *Chapman, supra*, 173 U.S. 205, 214

Aberdeen Bank v. *Chehalis County, supra*, (1897) 166 U.S. 440, 454, 460

Bell's Gap Railroad Co. v. *Pennsylvania, supra*, 134 U.S. 232, 237 [a 14th Amendment case]

This established rule of partial exemption, founded upon state and federal[130] public policy considerations, has not

[130] See "Statutes Involved", pp. 9-17, for an expression of the public policy to be served by state and federal savings and loan associations.

been altered or changed by any decision interpreting § 5219.

(b) The General Rule of Partial Exemption has been consistently held to exclude Mutual Thrift Institutions as a matter of law from the scope of § 5219.

This established rule of **partial exemption** has been consistently applied to permit tax exemption or preferential tax treatment of savings and loan associations and mutual savings banks.

Starting with *Mercantile Bank* v. *New York*, *supra*, 121 U.S. 138, this court held that the exemption of mutual savings banks did not invalidate a tax on national bank shares.

In reference to such institutions, the court stated, in part, at p 160:

"• • • It cannot be denied that these deposits constitute moneyed capital in the hands of individuals within the terms of any definition which can be given to that phrase; but we are equally clear that they are not within the meaning of the Act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must thereby also be exempted from taxation. • • • 'it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt'—*Hepburn* vs. *School Directors*, 23 Wall. 480—and that 'the act of Congress was not intended to curtail the state power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than **like property similarly invested.** It was not intended to cut off the power to exempt particular kinds of property, if the

legislature chose to do so.' *Adams* vs. *Nashville*, 95 U.S. 19. * * *" (Emphasis added)

This reasoning was followed in upholding the exemption of savings banks in

Davenport Bank v. *Davenport*, *supra*, 123 U.S. 83.[131]

This Court stated, on p 86, in speaking of the *Mercantile* case, *supra*, ruling as to savings banks:

"The whole subject has been recently considered by this court in the case of *Mercantile Bank* v. *New York*, 121 U.S. 138. In that opinion it was held that, while the deposits in the savings banks of New York constituted moneyed capital in the hands of individuals, yet **it was clear that they were not within the meaning of the act of Congress in such a sense as to require that because they were exempted from taxation the shares of stock in national banks must also be exempted.** The reason given for this is that the institutions generally established under that name are intended for the deposits of the small savings and accumulations of the industrious and thrifty; that to promote their growth and progress is the obvious interest and manifest policy of the state; and, as was said in *Hepburn*

[131]

In reference to this case the trial court below stated:

"The Court was to make clear which of these two reasons (competition or public policy rule of partial exemption, both of which were considered in the *Mercantile* case, *supra*) it considered the controlling one in later cases which came before it. * * * The opinion of the Court is of importance because the Court which had decided the Mercantile Bank case, took occasion to state the reason for its decision in that case; * * *." (81a) (Parenthetical portion added.)

vs. *School Directors*, 23 Wall. 480, it could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt." (Emphasis added)

The rule of these cases was followed in

Bank of Redemption v. *Boston, supra,* (1888) 125 US 60,

where it was urged that the question should be reconsidered in light of the marked differences between mutual savings banks in New York (*Mercantile Bank* case) and in Massachusetts (*Bank of Redemption* case). As to this contention, the court stated at pp 67-68:

"• • • The question of the exemption from taxation of deposits in savings banks, as affecting the rule for the State taxation of national bank shares, was very deliberately considered by this court in the case of *Mercantile Bank* v. *New York*, 121 U.S. 138, 160; and the conclusion reached in that case was reaffirmed in the case of *Davenport Bank* v. *Davenport Board of Equalization*, 123 U.S. 83. • • •

"It is impossible, in our judgment, to distinguish the present from the case of the New York savings banks, or of those of Iowa considered in the case of the Davenport Bank. • • •

"• • • They are substantially institutions, • • • **organized for the purpose** of investing the savings of small depositors, and not as banking institutions in the commercial sense of that phrase. We adhere to the rule as declared in the cases heretofore decided,

which forecloses further discussion * * *."[132] (Emphasis added)

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[132]

This case completely refutes the appellant's argument (Br. 27c, 78-79) that *factual competition* was absent in the partial exemption cases and that, therefore, such cases are inapplicable where the capital of savings and loan associations is found to be in factual competition with the business of national banks. Appellant's error is illustrated by the following references to the record [*Bank of Redemption, supra*, (1888) 125 U.S. 60; Records and Briefs, U.S. Sup. Ct., Vol. 472, Oct. Term 1887]:

1. The stipulation of facts reads in part: "Said savings bank in the year 1885, and in the years before that, received deposits and loaned a part thereof: (1) on promissory notes secured by collateral securities such as they were by law allowed to invest their deposits in; (2) on notes of cities and towns; (3) on promissory notes with two sureties, called 'loans on personal security', in most cases with collateral other than such as mentioned before (except in the case of notes of corporations which were taken without collateral and to a large amount), * * *." (P. 25-Record)
2. The stipulation further indicates that the notes of the savings banks were not materially different, in terms and conditions, from the bank notes and for that reason it was further stipulated that: "In the ordinary course of the business of borrowing and loaning money in Massachusetts persons engaged in obtaining loans on such notes or negotiating them for themselves or others during said years applied for and procured them indiscriminately at said savings banks and said national banks wherever they could obtain them on the best terms; and said savings banks usually made such loans on longer terms and lower rates * * *." (P. 26-Record)
3. Of approximately $66,000,000 of total assets of the savings banks in Boston in 1882, $25,000,000 were invested in the type of notes described above. (P. 71-Record)
4. Bank assets in Boston in 1882 amounted to approximately $111,000,000 and savings bank assets amounted to approximately $66,000,000, which was in excess of the value of all bank stock in Boston. (P. 71-Record)
5. Assets of savings banks in Massachusetts, amounting to ap-

Appellant attempts to persuade us (Br. 64) that the *Bank of Redemption* decision was overruled by *First National Bank of Hartford* v. *Hartford, supra,* (1927) 273 U.S. 548. There is utterly nothing in the *Hartford* decision which expressly or impliedly undertakes a repudiation of *Bank of Redemption. Hartford* was addressed to a situation where sweeping preferences were granted to large areas of competing money capital.[133]

In *Aberdeen Bank* v. *Chehalis County, supra,* (1897) 166 U.S. 440, this Court *again* affirmed the holding of the three earlier cases of *Mercantile Bank* v. *New York, supra,* 121 US 138; *Bank of Davenport* v. *Davenport, supra,* 123 US 83; and *Bank of Redemption* v. *Boston, supra,* 125 US 60. The Court considered at length the *Mercantile* decision (166 U.S. 440, 454-461). It analyzed the *Mercantile* holding to be (at p 460):

> "• • • As to savings banks it was held that, though it could not be denied that their deposits constituted moneyed capital in the hands of individuals, yet it

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proximately $115,000,000, included government bonds, railroad bonds, bank deposits, cash, real estate, loans on real estate mortgages, loans on public funds and bank stock, loans to governmental units, and loans of approximately $62,000,000 which were on personal security. (P. 43 Record)

It is evident that the record in the *Bank of Redemption* case, *supra,* showed *factual* competition between the savings banks in Massachusetts and in Boston and the national banks in Massachusetts and in Boston. The record in this case clearly establishes then that the activities of the mutual savings banks in the early partial exemption cases substantially overlapped the area of national bank activities of that day.

[133]

The Supreme Court of Michigan agreed with this statement (R. 1357).

was clear that they were not within the meaning of the act of Congress in such a sense as to require that, if they are exempted from taxation, shares of stock in national banks must also be exempted; that it was part of the policy of the State to encourage the accumulation of small savings belonging to the industrious and thrifty, and it was within the reasonable exercise of the power of the State to exempt particular kinds of property, * * *."

This court then applied § 5219 to general corporations, insurance companies and mutual savings banks as follows (166 U.S. 440, 460-461):

"The conclusions to be deduced from these decisions are that money invested in corporations or in individual enterprises that carry on the business of railroads, of manufacturing enterprises, mining investments and investments in mortgages, does not come into competition with the business of national banks, and is not therefore within the meaning of the act of Congress; that such stocks as those in insurance companies may be legitimately taxed on income instead of on value, because such companies are not competitors for business with national banks, and that exemptions, however large, of deposits in savings banks, or of moneys belonging to charitable institutions, if exempted for reasons of public policy and not as an unfriendly discrimination against investments in national bank shares, should not be regarded as forbidden by section 5219 of the Revised Statutes of the United States."

It is to be noted from this extract that **this Court specifically considered the question of competition with regard to general business enterprises and insurance companies, but deliberately separated its statement regarding public policy**

exemption of mutual savings banks from any element of competition.[134]

These earlier cases prompted this Court to say in *National Bank of Wellington* v. *Chapman, supra,* 173 U.S. 205, at p 214:

> "The result seems to be that the term 'moneyed capital,' as used in the Federal statute, does not include capital which does not come into competition with the business of national banks, and that exemptions from taxation, however large, such as **deposits in savings banks** or moneys belonging to charitable institutions, **which are exempted for reasons of public policy** and not as an unfriendly discrimination as against investments in national bank shares, **cannot be regarded as forbidden by the Federal statute.**" (Emphasis added)

Savings and loan associations are treated the same as mutual savings banks in reference to the application of the partial exemption rule. In fact, the testimony in this cause indicates they could not have validly been treated

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[134]

Woosley, in *State Taxation of Banks*, Chapel Hill, The University of North Carolina Press (1935), states, on pp. 26-27:

> "* * * In *Aberdeen* v. *Chehalis County*, they [savings banks] were recognized as belonging to the *genus* of competing moneyed capital, but the fact that the exemption from taxation was for reasons of public policy, and not as an unfriendly discrimination against national banks, prevented such exemption from invalidating the taxes on national bank shares." (bracketed material added)
>
> "* * * For reasons of public policy, as already indicated, bonds issued under state authority and deposits in savings banks are excluded from the list of other moneyed capital. * * *"

otherwise because of basic similarities and the absence of any substantial dissimilarities.[135]

That savings and loan associations were embraced within the Supreme Court's consistent rulings as to partial exemption of mutual savings banks, was judicially recognized for the first time in

Mercantile National Bank v. *Hubbard, supra,* (1899) 98 F. 465,[136]

at p 471:

"* * * It seems to me that building associations are certainly not to be differentiated in their purpose or object, or practical effect, from savings banks, * * *."

This has been well established as settled law by the following decisions:

Hoenig v. *Huntington National Bank, supra,* (1932)

[135]

In this particular, see *Commissioner of Corporations & Taxation* v. *Flaherty,* (1940) 28 N.E. 2d 433, 306 Mass. 461, certiorari denied 61 S. Ct. 450, 312 U.S. 680, where it was held that a state tax imposed on income received by shareholders in a federal savings and loan association incorporated under the "Home Owners' Loan Act of 1933" but not on income of cooperative banks which are incorporated by the state and conduct a substantially similar business, is invalid as discriminatory against shareholders in the federal association. Cf. *United States* v. *Cambridge Loan and Building Co.,* 278 U.S. 55.

[136]

Affirmed sub nominee *Lander* v. *Mercantile National Bank, supra,* 186 U.S. 458; cf. *Commissioner* v. *Flaherty, supra,* (1940) 28 N.E. 2d 433, 306 Mass. 461, certiorari denied 312 U.S. 680; *First National Bank of Shreveport* v. *Louisiana Tax Commissioner, supra,* (1933) 289 U.S. 60. *First Federal Savings & Loan Assn.* v. *Cassella,* 115A. 2d 455, 142 Conn. 483.

(CCA 6th Circuit) 59 F. 2d 479, cert. denied 287 U.S. 648

First National Bank of Shreveport v. *Louisiana Tax Commission, supra,* (1933) 289 U.S. 60

Mercantile National Bank v. *Hubbard, supra,* (1899) 98 F. 465

People v. *Goldfogle, supra,* (1924) 205 N.Y.S. 870, 123 Misc. 399, aff'd by App. Div., 211 N.Y.S. 85

First National Bank of Glendive v. *Dawson County,* (1923) 66 Mont. 324; 213 P. 1097

Merchants' National Bank of Glendive v. *Dawson County, supra,* (1933) 93 Mont. 310; 19 P. 2d 892

Consolidated National Bank v. *Pima County, supra,* 25 Ariz. 142, 48 P. 291.

In each of the cases in this last-referred to group, the courts, without exception, have excluded savings and loan associations from the purview of § 5219. The cases cover an expanse of time of approximately half a century. Each case involved savings and loan associations which obviously could not be similar in their fiscal importance or in the detail and scope of their operations because formed and regulated by the laws and practices of several states at different periods of time. Thus, **these cases are speaking in reference to basic public policy considerations involved in the very creation and existence of savings and loan associations** rather than to the possible ebb and flow of their fiscal significance or to the detail of their organization and activity.[137]

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[137]

The appellant rested its argument in the Court below on its contention that the partial exemption rule is related solely to noncompeting capital. Appellant then argued that the factual differences

It is believed this is sharply brought into focus in

Mercantile National Bank v. *Hubbard, supra,* (1899) 98 F. 465,

where the court found no difference between the mutual savings banks considered in

Mercantile National Bank v. *New York, supra,* (1887) 121 U.S. 138,

and the savings and loan associations of Ohio for § 5219 purposes. These remarks of Judge Taft in his opinion (p. [illegible]) are peculiarly directed to this question:

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of competition between the mutual savings bank and savings and loan associations involved in the *partial exemption* cases and the Michigan savings and loan associations justify a different result. As indicated by the facts of competition in the *Bank of Redemption* case, *supra*, and in the *Hoenig* case, *supra*, no different result is justified even though the question of factual competition were controlling. The records in the *Hoenig* (see infra p. 142) and *Bank of Redemption* (see supra p. 127) cases, as well as the other *partial exemption* cases, clearly indicate that the factual question of competition relied upon by appellant in this cause is immaterial.

Before this Court, appellant attempts to distinguish the partial exemption cases by asserting that the savings and loan associations in Michigan are no longer the type of institution to which the partial exemption rule is to be applied, apparently on the contention that there no longer exists any just reason for application of the same. This argument is groundless. The trial court stated:

> "Plaintiff further alleges that there has been such a substantial change in the purpose and character of building and loan associations since the savings bank cases and the Hubbard case that those authorities are no longer applicable.
>
> "This same contention was answered by the Circuit Court of Appeals in the Hoenig case. It is answered by the testimony of Professor Woolworth in this case and Congress by its definition of the purpose of the 1933 act effectively settles the question of the character and purpose of these institutions." (R. 104a-105a)

"* * * There is proof of the capital in savings banks, and also of the capital invested in building and loan associations; but, **under the decision** of *Mercantile Bank* v. *City of New York*, 121 U.S. 138, 7 Sup. Ct. 836, 30 L. Ed. 895, capital invested in savings banks cannot be regarded as moneyed capital, within the meaning of section 5219, **exemption of which from taxation can constitute a discrimination within the inhibition of that section. It seems to me that building associations are certainly not to be differentiated in their purpose or object, or practical effect, from savings banks,** and that the capital invested in them, though subject to a somewhat different rule of taxation, cannot be regarded as moneyed capital in competition with the moneyed capital in national banks, any more than is capital invested in savings banks. The **chief object of building associations is to encourage** the building of small houses by poor people, and the saving from their earnings, week by week, of an amount sufficient to pay the mortgage debts incurred in the purchase of the land and the construction of the house. **The mere fact that every shareholder in a building association need not be a borrower cannot, I think, change the effect of the general purpose of the building association law.** * * *" (Emphasis added)

Approximately twenty-four years after the *Hubbard* case, *supra*, the Supreme Court of Montana, in

First National Bank of Glendive v. *Dawson County*, *supra*, (1923), 66 Mont. 321, 213 P. 1097,

concluded that a tax on bank shares was not violated by tax exemption or preferential tax treatment of savings and loan associations because:

"* * *(1) Under the law the Glendive building and loan association was not and is **not permitted to do business in competition with the plaintiff bank within the purview of section 5219**; (2) the state of Montana, in levying taxes, may, if it sees fit, **favor building and loan associations as a matter of public policy**, and its action in so doing will not be deemed unfriendly discrimination against national banks." (Emphasis added)

People v. *Goldfogle, supra,* (1924) 205 N.Y.S. 870, 123 Misc. 399, aff'd by App. Div., 211 N.Y.S. 85

held that these associations were not within the purview of § 5219 and the states were entitled to treat them differently for taxation purposes than they do national bank shares.

At a later date, based upon the contentions that savings and loan associations had changed their methods of operation, had become financially more important, and were engaging in more phases of the banking business than the old associations, national banks litigated:

Hoenig v. *Huntington National Bank, supra,* (1932) (C.C.A. 6th Circuit) 59 F. 2d 479

Merchants' Nat. Bank of Glendive v. *Dawson County, supra,* (1933) 93 Mont. 310, 19 P. 2d 892

First National Bank of Shreveport v. *Louisiana Tax Commission, supra,* (1933) 289 U.S. 60.

As in the past, each court affirmed the proposition that savings and loan institutions, as a matter of law, were not within the purview of § 5219. They ruled out the claims

of bank counsel that the foregoing alleged change in these institutions changed prior law.[138]

In reply to the argument that such associations had increased their activity since the *Hubbard* decision, *supra*, and were now in competition with national banks, the court held at p 482 of the *Hoenig* case, *supra*, as follows:

> "It is insisted, however, that the present day building association is a very different type of institution from the 'small, neighborhood, mutual associations of Judge Taft's time,' and emphasis is laid upon the construction of offices in similitude to those of banks, the **competition for deposits**, the **payment of deposits on demand**, and the making of **loans upon collateral security.**[139] **We do not think that the general nature of the business of building associations has so far changed as to make the law established by the above-cited cases inapplicable.** Compare *United States v. Cambridge Loan & Bldg. Co.* 278 U.S. 5., 49 S. Ct. 39, 73 L. Ed. 180. The **chief purpose of these institutions is still 'to encourage** the building of small houses by poor people, and the saving from their earnings, week by week, of an amount sufficient to pay the mortgage debts incurred in the purchase of the land and the construction of the house.' *Mercantile National Bank* v. *Hubbard*, *supra*, (C.C.), 99 F. 465, 471. * * *" (Emphasis added)

In contrasting these associations with national banks, the court in the *Hoenig* case, *supra*, also stated, at p 482, that savings and loan associations were created in

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[138]

As did the Trial Court in the instant case (footnote 137, *supra*, R. 104a-105a).

[139]

These are areas forbidden to the Michigan and federal associations.

"• • • furtherance of a wholesome public policy to promote building, especially the building of homes, and to develop the habit of thrift." (Emphasis added)

In

Merchants' National Bank of Glendive v. *Dawson County, supra,* (1933) 93 Mont. 310, 19 P. 2d 892,

the Montana Supreme Court again held that savings and loan associations were without the purview of § 5219 for two reasons: First, they were not competitive institutions; and second, as stated at 19 P. 2d 896:

"• • • *The state may, if it sees fit, favor such associations in levying taxes, as a matter of public policy, without such action being regarded as unfriendly discrimination against national banks.* • • •"

Counsel for the bank in

First National Bank of Shreveport v. *Louisiana Tax Commission, supra,* (1933) 289 U.S. 60,

again contended that there was no proper basis in law or fact to exempt or preferentially treat savings and loan associations. This Court, in answer to such contention, again affirmed the well-settled rule that without violating § 5219 savings and loan associations could be treated differently than national banks for state taxation purposes based upon the fundamental differences between the two types of institutions.

In conclusion, it should be emphasized that each case involving the status of mutual savings banks and savings and loan associations was litigated with

Mercantile National Bank v. *New York*, *supra*, 121 US 138,

as direct and uncontroverted precedent. Counsel for the banks in every case subsequent to the *Mercantile* case, *supra*, had to factually distinguish the savings and loan associations or mutual savings banks of their respective jurisdiction from the same type of institutions involved in the prior decisions. **In each case, the courts found all alleged differences to be immaterial.**

It is thus conclusively established that a state's tax on bank shares cannot be invalidated because savings and loan associations are tax exempt or are given preferential tax treatment.[140]

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[140]

The *Boyer* and *Hartford* cases, *supra*, demonstrate its limitations, which simply are: (1) it must be a *partial* exemption of "other moneyed capital" and not a total exemption; (2) it must not create a hostile or unfriendly discrimination against national bank shares; and (3) it must be based on just reason. These limitations preserve the integrity of a state's power to carry out its public policy in tax matters and yet give the national banks and/or their shareholders the protection intended by § 5219, i.e., protection from unfriendly, hostile or discriminatory taxation by the state.

Appellant fails to realize that exemption or preferential tax treatment justified by public policy considerations (which is the basis of the restriction on a state's power to tax national bank shares in the first instance) does not result in discrimination. Is a home owner discriminated against when the local church is exempt from property tax but his home is not? It seems that he is not but, rather, that the church is favored because of the public policy of encouraging religion, which in turn should inure to the benefit of all.

The partial exemption rule is noted thusly by Woosley on p. 27:

> "One other type of innocuous inequality should be noted. In *Hepburn* v. *The School Directors* the court held that a *partial exemption* of other moneyed capital did not constitute a discrimination against national bank shares. In that case all mortgages,

2. There is no evidence in this record to show that the savings and loan associations in Michigan in 1952 were any different from the savings and loan associations considered in the above decisions which place such associations without the scope of section 5219.

The record amply supports this statement, and it is not refuted by the unsupported contracontentions of the appellant.

There is positive and unrefuted proof that the character, purpose and function of savings and loan associations, both in Michigan and elsewhere, have not changed. The fact that these **basic objectives** have not been altered is attested to by reference to the legislation that created them.[141]

State building and loan associations are incorporated under Act 50, PA 1887, as amended.[142] Section 1 states that the purpose of such associations is

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judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate were exempt from the taxation. In spite of these facts the court held that there might be some moneyed capital in the community which was taxed, and hence no discrimination existed against national banks."

The fact that savings banks were not subject to the restraint of § 5219 by the judicial decisions herein referred to was specifically noted and approved by the House manager in the proceedings concerning the 1923 amendments to paragraph (b) of § 5219 (64 Cong. Record 4802 [1923]).

[141]

In this connection, it is interesting to note that though appellant spent considerable effort on proof relating to the by-laws and organizational aspects of the Michigan associations, it has found *nothing* of significance to mention in its briefs, either here or in the Courts below.

[142]

C.L. '48, § 489.1, et seq.; Stat. Ann. § 23.541, et seq.

"• • • building and improving homesteads, • • • accumulating money to be loaned to its members • • • or assisting its members to accumulate and invest their savings, • • •."

Section 37 provides, in part, that

"No building and loan association shall, directly or indirectly, do a banking business, • • •."

Federal building and loan associations were created for similar purposes under the "Home Owners' Loan Act of 1933." 12 U.S.C. § 1464(a) recites that such associations are chartered

"• • • to provide local mutual thrift institutions and • • • the financing of homes. • • •"

Title 12, USCA, § 1464(b), permits federal associations to raise capital only in the form of "payments on such shares as are authorized in their respective charters." Such associations are prohibited from accepting deposits or issuing certifi ates of indebtedness, except for money borrowed from the Federal Home Loan Bank Board.

Decisions referred to above in regard to the status of mutual savings banks and savings and loan associations under § 5219, from

Mercantile National Bank v. *New York, supra,* 121 US 138,

through

Hoenig v. *Huntington National Bank, supra,* (1932) (C.C.A. 6th Circuit) 59 F. 2d 489, cert. denied 287 U.S. 648,

and

First National Bank of Shreveport v. *Louisiana Tax Commission, supra,* (1933) 289 U.S. 60,

make no detailed factual reference to what in fact such mutual thrift associations did. These cases referred to the chief object or purpose or fundamental character of these institutions. The courts concluded that the basic character, purpose and function of these associations differed markedly from the character of national banking associations and that, therefore, the preferential treatment or exemption of the savings shares of these associations did not violate § 5219. Certainly, there is nothing in the record in this cause about the nature of the organization and function or purpose of either the Michigan savings and loan associations or the federal savings and loan associations to indicate that they have departed from the purpose of their creation, i.e., to provide a means for people of all classes, including poor people, to accumulate savings or to obtain money for home financing purposes, or both. To the contrary, the record in this cause clearly shows that such was the purpose, function, and practice of the federal and state associations in Michigan in 1952. In fact, appellant's complaint is directed against the activities of savings and loan associations in carrying out the public policy of thrift savings and home financing. The alleged competition existing between the two institutions is the accumulation of thrift savings (bank deposits, as compared to savings share accounts) and

the loaning of these moneys for home ownership purposes.[143]

Counsel for appellant concede that the *Hoenig* case, *supra,* represents a proper interpretation of § 5219 (Br. 78). They assert that it was decided on "lack of factual competition (Br. 78).

The following table is a comparison of some of the statistical information set forth in the *Hoenig* record, with the same statistical information for Michigan in 1952.

The Court's attention is directed to the following facts illustrated by this table:

1. The assets of the savings and loan associations in Ohio in 1926 were approximately equal to the total assets of all national banks in Ohio, while in 1952 the assets of all savings and loan associations in Michigan constituted less than 15 per cent of the total assets of national banks in Michigan.

2. The assets of savings and loan associations in Ohio in 1926 were approximately double the total assets of such associations in Michigan in 1952.

Facts 1 and 2 would indicate that savings and loan associations in Ohio in 1926 were more predominant in the

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[143]

See also Woosley, *State Taxation of Banks, supra,* at pp. 40-41, wherein he analyzes the soundness of the *Shreveport* decision, *supra.* Apropos is this statement from Woosley, at p. 41:

"* * * Who can deny that deposit banking and specialized financial institutions, while unquestionably competitive in certain areas of their operation, are, however, substantially different in their financial functions."

"HOENIG" FACTS* (1926)			FACTS IN THIS CAUSE (1952)		
Assets of All National Banks in Ohio (1)	Assets of All S & L Ass'ns in Ohio (2)	Ratio of (2) to (1)	Assets of All National Banks in Mich. (3)	Assets of All S & L Ass'ns in Mich. (4)	Ratio of (4) to (3)
$947,979,000 [Report of the comptroller of the Currency, 1926, p. 4 4]	$928,381,733 [78,316]	.98	$3,728,340,000 [Exh. 226]	$534,314,000 [Exh. 6]	.143
Total Real Estate Loans of Banks at Beginning of Year and Percent of Assets	Total Real Estate Loans of Ass'ns at Beginning of Year and Percent of Assets	Ratio of 91% to 5.14%	Total Real Estate Loans of Nat'l Banks in the U.S. in Percent of Total Assets	Total Real Estate Loans of Ass'ns in the U. S. in Percent of Total Assets	Ratio of 81.2% (80.4%) to 7.6%
$48,742,000 [37, 65] =5.14%	$844,078,174.55 [38, 81] =91%	17.7	7.6% [Exh. 220, 224A]	81.2% (All S & L Ass'ns in Michigan=80.4%) [Exh. 209, 224A]	10.7 (10.6)
Deposits of All National Banks in Ohio	Deposits plus "Running Stock" of All Ass'ns in Ohio	Ratio of 79.6% to 71.3%	Deposits of All Nat'l Banks in the U. S.	Share Deposits of All Ass'ns in the U. S.	Ratio of 84.8% (87.0%) to 91.8%
$676,125,000 [64, 343] =71.3% of total assets	$738,548,784 [316] =79.6% of total assets	1.12	91.8% of total assets [Exh. 224] (Mich. Nat'l Bank is also 91.8%) 92.3	84.8% of total assets 87.0% in Michigan [Exh. 221, 222A]	.92 (.94)

Average Investment**
$497

Average Outstanding Loan
$2806

**Ohio associations had both deposits and savings share account holders. Some persons undoubtedly had both types of accounts. The record does not disclose the average per capita holding in both accounts.

The average investment of $497 includes reserves and undivided profits of $22 per share.

Average Shareholding
$1449 (8-15-52)

Average Outstanding Loan
$4872 (8-15-52)

financial business of Ohio than were the savings and loan associations in Michigan in 1952.

3. The average investment in the Ohio associations in the *Hoenig* case, *supra,* was about $500, compared to approximately $1500 in Michigan in 1952.

If any realistic consideration is given to inflation, which was the subject of testimony of Professor Woodworth (R. 902a) and to the general growth of our economy, the average of $497 in 1926 could not be said to represent an investment by a different class of people from Michigan share account holders in 1952.

4. In the *Hoenig* case, *supra,* the average outstanding loan was $2,806 in 1926, while the average outstanding loan of Michigan associations in 1952 was $4,872.

Taking into consideration the same factor of inflation as used in comparing the average shareholder account, it is obvious that the Ohio associations were not loaning to any poorer, or lower class of people, than were the Michigan associations.

The Ohio savings and loan associations could accept deposits (which were closely akin to deposits in mutual savings banks). They could float their own bonds to obtain capital funds to invest and they not only dealt extensively in the mortgage loan field in the same manner as did the national banking associations, but they also were able to make personal loans and to deal extensively in the securities field.

The above referred to facts, plus numerous other facts set forth in the *Hoenig* record, *supra,* clearly establish that the savings and loan associations in Ohio were not

only much more formidable economic units than the savings and loan associations in Michigan in 1952, but that those associations were able to carry on activities and operations more closely analogous to the business of banking than were the federal or Michigan associations in 1952. **(Extracts from the Hoenig record that conclusively demonstrate the above statement are set forth as an addendum B to this brief.)**[144]

The above comments and conclusions in regard to the nature, character and purpose of the savings and loan associations in the *Hoenig* case, *supra,* and the existence of *factual* competition is in accord with the conclusion of the Special Master Commissioner, the District Court and the dissenting opinion of the Circuit Court of Appeals in the *Hoenig* case.

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[144]

In further reference to the *Hoenig* record, the Court's attention is particularly directed to the Report of the Special Master Commissioner, filed July 18, 1929, set forth on pp. 28-54 of the *Hoenig* record, *supra,* and more particularly as follows: Statistical information on p. 28 through top of p. 33, showing the financial picture of national banks in Columbus, other large cities in Ohio, and the state of Ohio, as well as the corresponding figures of building and loan associations; pp. 34 and 35, paragraphs VIII and IX, setting forth the kind of activities, including real estate mortgage activity, carried on by building and loan associations in Columbus, Ohio (location of the plaintiff-bank in the *Hoenig* case, *supra*); p. 35 through top of p. 38, paragraph X, setting forth information concerning national bank activity of the plaintiff-bank; other banks in the city of Columbus, Ohio, and in the large citier of Ohio; and p. 38 to the top of p. 39, paragraph XII, referring to the mortgage business of the savings and loan associations; balance of p. 39 and p. 40, paragraph XII, where the Special Master Commissioner found only two or three small associations followed the so-called "old mutual plan" and the remainder of the associations required only a nominal, initial stock subscription as a condition for obtaining a loan.

The Special Master Commissioner found:

> "Upon the evidence in this case, the Master is required to find, and does find, that a relatively large and material part of the monied capital of building and loan associations in the City of Columbus is employed in the making of loans of a kind normal to national banks and in substantial competition with the business of the plaintiff banks and other national banks in the City of Columbus in the making of mortgage loans by such national banks and the employment of their capital for this purpose. * * *" [*Hoenig Record*, p 44]

The District Judge, in his "Special Findings of Fact and Separate Conclusions of Law" [Hoenig Record, pp 81, 82], referred at length to the varied and substantial activity of the savings and loan associations in Ohio, which constituted the same activity carried on by national banks in Ohio and in Columbus, and concluded, after the analysis of the facts:

> "As a conclusion from the above facts, it is found that while not all of the business done by building and loan companies comes into competition with the plaintiffs and other national banks in the City of Columbus, a relatively large and material part of the moneyed capital of building and loan associations in the City of Columbus is employed in the making of loans of a kind normal to national banks and in substantial competition with the business of the plaintiff banks and other national banks in the City of Columbus in the making of mortgage loans by such national banks and the employment of their capital for said purpose." (p 81, 82—record)

The dissenting opinion in the Circuit Court of Appeals arrived at the same conclusion. Because of such substantial competition, the lower court held that § 5219 was violated by the Ohio tax on national bank shares.

It is thus apparent that the opinions in the *Hoenig* case amply demonstrate that the Circuit Court of Appeals, in reversing the lower court, was well aware of the substantial *factual* competition found to exist by the Master and by the District Court. The existence of such competition, as a matter of fact, was the basis of the dissenting opinion, as well as of the lower court's opinion. In spite of the existence of such *factual* competition and without reversing the finding of factual competition the majority in the *Hoenig* case found no substantial competition within § 5219 because of the marked differences between savings and loan institutions and national banks and also because they found that in any event the *partial* exemption rule controlled.

It is sufficient to state here, in conclusion, that the appellant, by the format of its own argument as tested against the *Hoenig* record, has made no case. Certainly, there is nothing in the *Hoenig* record to support its argument that the Michigan savings and loan associations are serving different people, or different interests, from the Ohio building and loan associations referred to in the *Hoenig* record. If any exact comparison of these two classes of associations is to be made, it is quite evident that the Michigan and federal associations in Michigan in 1952 were truer in character, function and purpose to the traditional mutual thrift societies than the building and loan associations in Ohio in 1926.

3. The purpose and established public policy treatment of savings and loan associations cannot be properly challenged in this proceeding.

Federal savings and loan associations, since their creation by Congress in 1933, have uniformly been construed to exist in the public interest as quasi-public institutions, as contrasted to mere private business organizations. Congress has not only appropriated large sums of money for their formation[145] and for the federal savings and loan insurance corporation[146] (of which they were automatically made members along with cooperative banks, homestead associations and other state associations), but it specifically stated the purpose of their creation. This purpose is "to provide local mutual thrift institutions"[147] and not to create institutions to engage in the general banking business.[148] Or, as set forth in § 1464(a) of USCA, it is to provide local, mutual thrift institutions in which people may invest their funds in order to provide for the financing of homes. It is in furtherance of a governmental and public purpose to meet the national problem of preserving home ownership and promoting a sound system of home mortgage financing.[149] It is actually the further-

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[145]
12 U.S.C. § 1464(g); 12 U.S.C. § 1465.

[146]
12 U.S.C. § 1725.

[147]
12 U.S.C. § 1464(a).

[148]
U.S. ex rel. State of Wisconsin v. *First Federal Savings and Loan Assn.* (D.C. Wis. 1957), 151 F Supp 690; cf. *Springfield Institution for Saving* v. *Worcester Federal Savings and Loan Assn.*, (1952) 329 Mass 184, 107 NE 2d 315, and *Fahey* v. *Mallonee*, 332 US 245.

[149]
This was upheld under the general welfare clause in *First National*

'ance of this policy which has permitted the appellant to loan on F.H.A. and V.A. mortgages and to trade in them in 1952.

The whole savings and loan insurance system applicable to both state and federal associations was inaugurated under this theory.

Federal Savings and Loan Ins. Corp. v. *Edison Savings and Loan,* 177 Fed 2d 638.

The public policy position of both the state and federal savings and loan associations has been so well established that it has become "Hornbook Law."

12 C.J.S., "Building and Loan Associations," § 2, discusses the origin and growth, and § 3 discusses the nature, status and distinguishing features of such associations. In the aforesaid § 2, at p 396, it is stated in part:

> "Where these institutions have been properly regulated and conducted, they have been of tremendous value in encouraging thrift and the ownership of homes among people of moderate means. • • •"

or as stated in § 3, pp 396, 397:

> "Building and loan associations are in a class by themselves. • • • Such associations may be of a public or quasi-public, character, and are not commercial bodies in the large or popular sense of the term; but

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Savings and Loan Assn. of Wisc. v. *Loomis,* 97 F 2d 831 (in which, after certification to the attorney general as presenting a constitutional question, the plaintiff finally dismissed the appeal to the Supreme Court, 305 US 666).

are, by their very nature, semiphilanthropic, although, as compared with benevolent institutions, they are held to be organizations for private gain."

The above considerations were well expressed in

Union National Bank of Clarksburg, et al. v. *Home Loan Bank Board, et al.*, (1956) 233 F. 2d 695.

There is no reason to suppose that the position of state savings and loan associations is different from the federal associations. This is particularly true in regard to Michigan associations which parallel very closely the federal type of institution. There would seem no basis, therefore, in law or fact to treat the institutions separate and distinct for the problem at hand.

The rule is stated in

Phelps v. *American Savings and Loan Association*, 121 Mich. 343, 354,

as follows:

"* * * Building and loan associations are peculiar institutions, and, from some real or imaginary benefit that they are supposed to afford the poorer classes of society, are frequently given exceptional advantages over other corporations and private persons, such as immunity from taxation and usury laws. * * *"

Cf

Stoddard v. *Saginaw Building & Loan Association*, 138 Mich. 83, 79a

These public policy considerations cannot be now disputed. It is clear that unless the appellant can establish that these institutions should no longer be favored by public policy considerations, it cannot properly assert the inapplicability of the mutual savings bank and savings and loan association decisions referred to herein at length, or to otherwise impeach the pronounced policy of both the State of Michigan and the federal government in creating and fostering (historically and in 1952) savings and loan associations.

In the instant case, clearly the pronounced public purpose of the federal and Michigan savings and loan associations has always been the promotion of thrift savings and home ownership. To this end Congress has become involved in these areas under the general welfare clause and has enacted statutes in their furtherance. **Moreover, there is not one iota of proof that these associations have ceased to fulfill their original purpose, as defined by the respective statutes creating them.** They still operate in

> "• • • *furtherance of a wholesome public policy to promote building, especially the building of homes, and to develop the habit of thrift.*" (Emphasis added) *Hoenig* v. *Huntington National Bank, supra,* (1932) (C.C.A. 6th Circuit) 59 F. 2d 479, 482.

As stated by Judge Story, in the early case of

> *Girard* v. *Mayor, Aldermen and Citizens of Philadelphia, Pa.,* 2 How., U.S., 127, 197, 11 L. Ed. 205:
>
> "• • • Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its

constitution and laws and judicial decisions make known to us. * * *"

Thus, public policy does not mean simply what the appellant wants or what a court might decide is good and beneficial in an isolated case; but it is something that grows out of and is formulated by the general experience of the community, culminated in tested statutory and judicial pronouncements.

The appellant seeks to challenge this established public policy treatment of savings and loan associations in Michigan for the year 1952 with the purpose in mind of having this Court conclude that "Change in the manner and scope of doing business by savings and loan associations and national banks since 1900 makes the early cases inapplicable" (Br. 65). Under this heading, appellant discusses the change in the power of national banking associations to make mortgage loans generally and then points to the change in the power of the national banking associations to make long term residential loans (Br 65). On pages 66-70 it discusses the savings and loan associations of the early days, without making any references to the record of this cause. Then, on pages 71-76 and 85-86, it argues that there is no just reason for savings share accounts to be exempt or taxed differently than national bank stock.

The appellant arrives at this conclusion by asserting that "The modern shareholder is different from the shareholder of 1900" (Br. 71-73); that "The modern borrower is different from the borrower of 1900" (Br. 74); and that "The modern associations are no longer mutual" (Br. 74-76). The most that can be said for such argument is that the conclusions appellant urges are supported by neither the record in this cause nor its own logic. The appellant does not support its statements concerning "change" in savings and

loan associations by any reference to the record. The only two witnesses[150] who testified to the question of "change" denied that there was any significant change in the character, object or purpose of either mutual savings banks or savings and loan associations. Professor Woodworth concluded:

> "From the earliest days, there have been considerable changes in the technical methods by which this type of organization [savings and loan associations] operates but there have not been substantial changes in the character of the business in terms of accumulating small thrift accounts and lending those accounts for home building purposes." (R. 894a-895a) (Bracketed material added)

In reference to the question of mutuality of savings and loan associations, Professor Woodworth stated that in the associations prior to 1900, individuals did not become investing members with the expectation of ultimately becoming borrowing members as well (R. 897a); that there was a very definite separation, in fact, between the shareholders who did and the shareholders who did not want to borrow (R. 897a); and that the essence of the mutuality of these organizations and the basis for their tax treatment was not the fact that the members were both borrowers and lenders (R. 898a). He testified:

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[150]

Ethan Doty, Director of the Savings and Loan Division of the Michigan Secretary of State's office, testified that there were no material changes in state associations as to character, purpose and practice and that such associations, to his knowledge, had always served the same classes of people. (R. 734a-743a). Appellant's counsel attempted to establish "change" by cross-examination of Professor Woodworth (R. 894a-901a).

"* * * I think the fact that the members were both borrowers and lenders was a rather superficial aspect of the organization. The mutuality in substance applies to the analogy with a mutual savings bank which we call a mutual organization. There was no tieup ever between the depositors and the lenders of those organizations. *The main point is that they are not private profit institutions with capital stock* that is bought and sold on the markets, and, as we have discussed before, is a sort of an investment where you take great chance of gain and great chance of loss. * * *

"* * * *a shareholder did not have to borrow at any time so far as I know in the early associations.*" (Emphasis added)

It is therefore evident that the savings and loan associations doing business in Michigan in 1952 were not different in character, purpose and function from the mutual institutions considered by this Court in the savings bank cases of

Mercantile National Bank v. *New York, supra,* (1887) 121 U.S. 138,

Davenport Bank v. *Davenport, supra,* 123 U.S. 83,

Bank of Redemption v. *Boston, supra,* (1888) 125 U.S. 60,

or the savings and loan associations involved in

First National Bank of Shreveport v. *Louisiana Tax Com.,* (1933) 289 U.S. 60, and

United States v. *Cambridge Loan & Bldg. Co, supra,* 278 U.S. 55,

Mercantile National Bank v. *Hubbard, supra,* (1899) 98 F. 465, and

Hocnig v. *Huntington Nat'l Bank, supra,* (1932) (C.C.A. 6th Circuit) 59 F. 2d 479 (cert. denied 287 U.S. 648).

B. CONGRESS HAS MADE CLEAR THAT THE PHRASE "OTHER MONEYED CAPITAL IN THE HANDS OF INDIVIDUAL CITIZENS OF SUCH STATES COMING INTO COMPETITION WITH THE BUSINESS OF NATIONAL BANKS," AS USED IN § 5219, DOES NOT INCLUDE SAVINGS AND LOAN ASSOCIATIONS.

In 1933 the Congress of the United States enacted the "Home Owners' Loan Act of 1933."[151] Among other things, this legislation for the first time provided for the organization of federal savings and loan associations under the auspices of the federal government.[152] Prior to this law, all savings and loan associations and similar institutions were organized and supervised solely by the several states.

The purpose of the law is best stated therein:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of

[151] June 13, 1933, ch. 64, 48 Stat. 128; 12 U.S.C. 1461, et seq.

[152] 12 U.S.C. 1464.

associations to be known as 'Federal Savings and Loan Associations', and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." Par (a), § 1464, Title 12, U.S.C.

The enactment created a comprehensive pattern for this new type of federal instrumentality and made provision for the method of organization of such entities, their capital requirements, their lending and investment powers and the selection of localities for the establishment of such associations. It also made provision for federal assistance in the raising of capital funds and set forth the requirements for state associations converting into federal associations and the opposite procedure.

The law designated these associations as fiscal agencies of the United States and carefully stated the manner in which, and the extent to which, such associations might be taxed by the several states. The Act provides:

"Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States (except the taxes imposed by sections 1410 and 1600 of Title 26 with respect to wages paid after December 31, 1939, for employment after such date, and except, in the case of taxable years beginning after December 31, 1951, income, war-profits, and excess-profits taxes), and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States; *and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associa-*

tions or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." (Emphasis added) Par (h), § 1464, Title 12, U.S.C.

In taxing federal savings and loan associations, the state of Michigan follows this mandate.

In view of this law, it cannot be argued with any force that Congress intended that the newly created federal savings and loan associations should be classified with national banks for the purposes of state taxation. The national legislature could have exempted such associations and their shareholders from state taxation altogether, or it could have permitted them to be taxed in the same manner as its own creatures, national banks. As the trial court stated (R. 104a):

"In providing for the taxation of these institutions by the State, Congress could have made the measuring stick, the limit on the rate of taxation, that imposed on national banks, also a creation of Congress. It could have made such measuring stick the rate imposed by the states on state banks and it could have made it that imposed on other moneyed capital. It did none of these things. Instead, it provided that the tax imposed should not be greater than that imposed on 'other similar local mutual or cooperative thrift and home financing institutions.'

"Congress thus identified the institutions that it considered to be in competition with Federal Savings and Loan Associations. Obviously, Congress did not consider savings and loan associations to be in competition with banks, either state or national."

Here the sole claim of appellant bank is that savings and loan associations chartered by the federal government and similar associations chartered by the state of Michigan constitute "moneyed capital" in competition with the business of national banks and must be classified with a national bank operating in Michigan in determining whether the state of Michigan has followed the tax pattern permitted by § 5219. Apart from other answers to this unfounded claim, paragraph (h), supra, of the Act by itself makes untenable the argument of appellant. To contend that, despite the Act, federal savings and loan associations should be classified with national banks for purposes of state taxation, and not with similar associations as the law provides, is to argue that Congress does not know its business and would amount to advocacy of complete nullification of the statute.[153]

The language of the Act is clearly intended to provide that the comparative for state taxation of federal savings and loan associations is only "similar local mutual or cooperative thrift and home financing institutions." This means state chartered savings and loan associations and mutual savings banks. Inferentially, these last mentioned institutions are thus classified for tax purposes by Congress. They are compared with federal savings and loan associations and not with national banks.

It would be idle to contend that in making the classification which it did, the Congress was unaware of the

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As the trial Court pointed out, the savings and loan associations were created under the general welfare clause, and national banks were created under the clause permitting Congress to create and maintain a federal monetary system. Thus, initially, we are dealing with two different concerns—each given particular competitive tax status to implement its purposes.

impact on § 5219. This is clearly demonstrated by congressional state tax treatment of **joint stock land banks,**[154] when it provided:

> "Nothing herein shall prevent the shares in any joint stock land bank from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the bank is located; but **such assessment and taxation shall be in manner and subject to the conditions and limitations contained in section fifty-two hundred and nineteen of the Revised Statutes with reference to the shares of national banking associations.**"

and the similar treatment of the **national agricultural credit corporation**[155] when it provided:

> "Taxation by a State of the shares in National Agricultural Credit Corporations, or of dividends derived therefrom, or of the income of said corporations, or real estate owned by them, shall be such only as is or may be authorized by law in the case of national banking associations; and **taxation by a State of the debentures or other obligations of such corporations shall not be at a higher rate than the rate applicable to other moneyed capital in the hands of individual citizens thereof.**"

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[154] Act of Congress, July 17, 1916, ch. 245, title I, § 16, 39 Stat. 371, 12 U.S.C. 810, et seq.

[155] Act of Congress, March 4, 1923, ch. 252, title II, § 201, 42 Stat. 1461; 12 U.S.C. 1151, et seq.

Congress was certainly aware of the status and the character, purpose and functions of state savings and loan associations at the time of the enactment of § 5219 and at the time of the enactment of the federal statute creating federal savings and loan institutions in 1933.[156]

It was undoubtedly also aware of the status of case law, such as

Hoenig v. *Huntington National Bank, supra*, (1932) (C.C.A. 6th Circuit) 59 Fed. 2d 479,

holding that savings and loan associations were not included within § 5219. *Therefore, it seems reasonable to conclude that Congress withdrew savings and loan associations from any consideration under § 5219* when it permitted federal associations to be compared only with "similar local mutual or cooperative thrift and home financing institutions."

The above conclusion is further buttressed by a consideration of proper rules of statutory construction and subsequently proposed legislation.

To aid the Court in ascertaining the legislative intent of the Congress, § 5219 must be construed in light of the "pari materia" rule of construction, which simply means that all statutes relating to the same subject or all statutes having the same general purpose should be read together to constitute a harmonious whole.

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See 82 CJS, § 316, pp 541-544, inc., and § 362, pp 794-795, wherein it is stated that legislatures are presumed to act with full knowledge of existing conditions.

Section 1464, paragraph (h), Title 12, U.S.C., supra, relating to restrictions imposed on the several states in taxing federal savings and loan associations, is such a law. Both it and § 5219 relate to the extent to which the Congress has empowered the several states to impose taxes on the exact types of institutions which are the subject of this lawsuit.

Such statutes should be construed together as though they constituted one law.

United States v. *Freeman*, 3 How (44 U.S.) 556

United States v. *Stewart*, 311 U.S. 60

In the *Freeman* case, at p 564, the court said:

> "The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law. Doug., 30; 2 T. R., 387, 586; 4 Mau & Sel., 210. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; Ld. Raym., 1028; and if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute . . . ."

In the *Stewart* case, at pp 64 and 65, the court said:

> "The Revenue Act of 1916 (39 Stat. 756) was enacted shortly after the Farm Loan Act by the same

Congress and at the same session. Sec. 2 of that Act, like Sec. 22(a) of the 1928 Act, included in taxable income 'gains, profits, and income derived from . . . sales, or dealings in property.' And Sec. 4 of that Act, like Sec. 22(b) (4) of the 1928 Act, exempted from taxation 'interest upon . . . securities issued under the provisions of the Federal farm loan Act.' It is clear that 'all acts *in pari materia* are to be taken together, as if they were one law.' *United States* v. *Freeman*, 3 How. 556, 564. That these two acts are *in pari materia* is plain. Both deal with precisely the same subject matter, *viz.*, the scope of the tax exemption afforded farm loan bonds. The later act can therefore be regarded as a legislative interpretation of the earlier act (*Cope* v. *Cope*, 137 U.S. 682, 688; cf. *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331-332) in the sense that it aids in ascertaining the meaning of the words, as used in their contemporary setting. It is therefore entitled to great weight in resolving any ambiguities and doubts. Cf. *United States* v. *Stafoff*, 260 U.S. 477, 480 * * *."

It is well established that the "pari materia" rule applies even though the statutes to be construed together were enacted at different times.[157]

Great Northern Ry. Co. v. *United States*, 315 U.S. 262

Hubbell v. *Commissioner of Internal Revenue* (C.C.A. 6th Circuit), 150 F. 2d 516; 161 A.L.R. 764.

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The "pari materia" rule is peculiarly applicable to tax legislation.

United States v. *Stewart*, *supra*; 311 U.S. 60.

United States v. *Goldberg*, C.A. Minn. 225 Fed. 2d 180.

Kirkwood v. *Arenas*, C.A. Cal. 243 Fed. 2d 863.

A realization that Congress intended to create in the Home Owners' Loan Act of 1933 a fundamentally different institution than a national bank was recently pronounced by the United States Court of Appeals, District of Columbia Circuit, in

> *Union National Bank of Clarksburg, et al.* v. *Home Loan Bank Board, et al., supra,* (1956) 233 F. 2d 695.

In that case, the plaintiffs were four national banks, two state banks and an industrial loan company who sought to prevent issuance of a charter to a federal building and loan association. In granting a motion for summary judgment, the Court of Appeals rejected the argument that such plaintiffs were in any sense local thrift and home financing institutions which could attack the issuance of such a charter, stating at pp 696-697:

> "• • • In our opinion neither commercial banks, nor industrial loan companies organized under the laws of West Virginia, even though they do finance homes, are 'local thrift and home-financing institutions' in the sense in which that term is used in Sec. 5(c) of the Home Owners' Loan Act. The next section of the Act; Sec. 6, 48 Stat. 134, 12 U.S.C.A. Sec. 1465, authorizes the Board to spend $850,000 of congressionally appropriated funds 'in the promotion and development of local thrift and home-financing institutions, whether State or Federally chartered.' Neither the Act nor its legislative history suggests that Congress used the term 'thrift and home-financing institutions' in different senses in §§ 5 and 6, or that Congress contemplated subsidizing commercial banks and industrial loan companies. *We think Congress was concerned only with the creation and the con-*

tinued existence of institutions, such as savings and loan or building and loan associations, which are primarily devoted to receiving savings from their members and lending money on homes.

"Since Congress has shown no intention to protect appellants 'from competition by a Federal instrumentality • • • they have no basis for asserting that the competition • • • is illegal as to them.' • • •" (Emphasis added)

In the case of

United States of America, ex rel. State of Wisconsin v. *First Federal Savings and Loan Association, and Federal Home Loan Bank Board, supra,* (1957) 151 F. Supp. 690,

the question presented concerned the right of defendant association to establish branch offices which was denied by state law to associations of a similar kind organized under the law of Wisconsin.

Plaintiff, in that case, among other things, urged that the policy reflected in the National Bank Act requiring conformity to state and local policy on the matter of branches and agencies (Par 36, Title 12, U.S.C.A.) is applicable to the Home Owners' Loan Act and the federal savings and loan associations chartered thereunder. The court held that the federal savings and loan associations could establish branches and that the rule embodied in the National Banking Act, governing that subject for national banks, was in no way applicable because of the completely different nature of the defendant institutions.

In disposing of plaintiff's argument and deciding for defendants, the court said on p 697:

"The plaintiff has failed to point out any reason or fact why this is not a correct construction of the statute. Perforce we hold to he interpretation made by that appellate court.

"Despite the fact that the State of Wisconsin has obviously devoted a great deal more of its efforts to the argument that the policy and decisional law attending the National Banking Act is here applicable, we find nothing that is new and was not considered and disposed of in the North Arlington case in the following language, 187 F. 2d at page 567:

"'*These savings and loan associations do some of the same things which banks do, obviously. But they do not do a general banking business. They are set up under the declared Congressional purpose to provide thrift institutions in which people may invest their funds and to provide for the financing of homes. There is no danger of any single association becoming a giant monopoly. Its investment area is limited.* • • •'" (Emphasis added)

Again, on p 699, the court stated:

"It must be abundantly clear that this court must decline the plea of the State of Wisconsin that it depart from the holdings of the cases of *North Arlington National Bank* v. *Kearny Federal Savings & Loan Association*, 3 Cir., 1951, 187 F. 2d 564, certiorari denied 1951, 342 U.S. 816, 72 S. Ct. 30, 96 L. Ed. 617, *Springfield Institution for Savings* v. *Worcester Federal Savings & Loan Ass'n.*, 1952, 329 Mass. 184, 107

N.E. 2d 315, certiorari denied 1952, 344 U.S. 884, 73 S. Ct. 184, 97 L. Ed. 684 and *First National Bank of McKeesport* v. *First Federal Savings & Loan Assn. of Homestead*, 1955, 96 U.S. App. D. C. 194, 225 F. 2d 33."

In light of the passage by Congress in 1933 of the act creating federal savings and loan associations, which specifically provided for the method by which the several states might tax them, it seems altogether plain that the broad and general language of § 5219 (in which appellant seeks to wrap and enclose these mutual thrift societies) cannot by any stretch of the imagination be held to embrace them.[158]

The intention of Congress to further distinguish the two institutions taxwise is emphasized by the provisions of the Internal Revenue Code of 1954. Section 593 of the Code provides a method for savings and loan associations to create a reserve for bad debts which, in practical effect, results in little or no income tax liability for nearly all savings and loan associations. This section constitutes more than a difference in accounting methods, as is illustrated by the fact that only **one** of the sixteen savings and

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[158]

Another example of Congressional intention to classify various financial institutions in a different manner is its treatment of federal credit unions created in 1933 by the "Federal Credit Union Act," June 26, 1934, ch. 750, § 1, 48 Stat. 1216; § 1751, et seq., Title 12, U.S.C. Congress required that federal credit unions "organized * * * for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes" were not to be taxed by the states. The act permits the states to tax the *holdings* at a rate not to "exceed the rate of taxes imposed upon holdings in domestic credit unions". Still another is the complete exemption from taxation of national farm loan associations (July 17, 1916, ch. 245, title I, § 26, 39 Stat. 380; 12 U.S.C. 931).

loan associations in question incurred any federal income tax liability in 1952 (DF. Ex. 210; R. 748a, 1276a).

Also, Section 591 permits the savings and loan associations to deduct "dividends" to the savings share account holders in the determination of taxable income for federal income tax purposes, which privilege is not granted to banks. Banks, on the other hand, are included under § 166(c) of the Code and are restricted to the same method of charging off bad debts as is conferred upon all other corporations. If Congress regarded building and loan associations as "competing moneyed capital," it is difficult to understand why national banks should receive such unique treatment.

This different treatment undoubtedly is due to Congress' recognition of the essential differences between these two types of institutions. Such recognition is further illustrated by the fact that in the District of Columbia Congress does not subject building and loan associations to the same rate of taxation as it imposes upon commercial banks. Under appellant's theory that a difference in rates on these institutions is contrary to § 5219, the District of Columbia tax legislation would be unlawful as to national banks if passed by a state legislature.[159]

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[159]

Section 47-1701 of the District of Columbia Code provides:

"Each national bank as the trustee for its stockholders . . . shall pay to the collector of taxes of the District of Columbia per annum 6% on . . . gross earnings . . ."

Section 47-1704 states:

"Building associations in the District of Columbia shall pay to the collector of taxes of the District of Columbia two per centum per annum on their entire gross earnings for the preceding year ending June 30th. (July 1, 1902, 32 Stat. 620, ch. 1352, § 6, par. 9; Apr. 28, 1904, 33 Stat. 564, ch. 1815)."

Reference to the tax laws of other states applicable to these two

The foregoing legislative pattern illustrates, without doubt, that Congress never did, and does not now, consider savings and loan associations to be within the purview of § 5219. It never did, nor does it now, intend that such institutions should be regarded as institutions employing moneyed capital in substantial competition with the business of national banks.[160]

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types of institutions further indicate their distinct treatment for tax purposes. This but further illustrates the absurdity of the appellant's discrimination argument.

[160]

Appellant's contention that the lower courts reasoned that the Home Owners' Loan Act of 1933 "evidences a Congressional intent to exclude shares in savings and loan associations from the operation of R.S. 5219" (Br. 45), is absolutely groundless. The trial court analyzed the effect of the Home Owners Loan Act of 1933 thusly:

> "And if the Court by its broad language in the Hartford case and by its emphasis on competition in the Shreveport case indicated any doubt as to the power of the State to exempt building and loan associations, the congressional act later in 1933 appears sufficient reason for holding that Congress has removed that doubt. * * *" (R. 101a)
>
> "I find this 1933 action on the part of Congress very significant.
>
> "—In providing for the creation of Federal Savings and Loan Associations, Congress acted under its welfare powers, while in its earlier action providing for national banks, it had acted under its monetary powers.
>
> "—In the 1933 Statute, Congress determined that savings and loan associations were 'local mutual thrift institutions in which people may invest their funds' and (which) 'provided for the financing of homes.'
>
> "Congress determined that the interest of the people of the United States would be served by the organization and operation of such institutions and that the appropriation of public funds for that purpose was justified." (R. 103a)
>
> "Congress thus identified the institutions that it considered to be in competition with Federal Savings and Loan Associa-

5.

THE "CAPITAL" OF THE SAVINGS AND LOAN ASSOCIATIONS IN MICHIGAN IS NOT MONEYED CAPITAL COMING INTO SUBSTANTIAL COMPETITION WITH THE BUSINESS OF NATIONAL BANKS WITHIN THE MEANING OF SECTION 5219.

Since § 5219 is designed to prevent discrimination which would result in unequal or unfriendly competition between the business of national banks and a relatively material part of other moneyed capital, the question of substantial competition is immaterial because of the lack of such discrimination. Furthermore, the partial exemption rule and the statutes and evidence pertaining to the function and purpose served by the savings and loan associations render the question of competition immaterial.

At the outset, it is noted that the competition with which § 5219 is concerned is employment of other moneyed capital in substantial competition with the employment of the share capital of national banking associations. The competition question directs itself to the employment of the capital account of national banks as compared to other moneyed capital, which, under the appellant's definition, would include savings and loan share accounts and bank deposits. By appellant's definition the "other moneyed capital," in the case of savings and loan associations, consists of savings share accounts employed in the residential mortgage market; yet, all of the appellant's residential mortgages were made through employment of its "other moneyed capital," namely, from deposits, and not from its capital account (R. 687a).

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tions. Obviously, Congress did not consider savings and loan associations to be in competition with banks, either state or national." (R. 104a)

There is thus posed an interesting question of competition. If appellant's only allegation of competition is competition **for loans**, and loans are conceded not to have been made from the moneyed capital represented by appellant's shares of stock (capital account), how can the appellant claim that there is **any** competition between the employment of the moneyed capital represented by savings shares and the moneyed capital represented by its own stock?

If the competition is **for savings** and **their employment**, there is no **rate** discrimination.[161]

This Court recognized the verity of this incongruity in the mutual savings bank cases and was well aware of it in *First National Bank of Shreveport* v. *Louisiana Tax Com., supra,* (1933) 289 U.S. 60, where it stated:

> "There is a fundamental difference between banks, which make loans mainly from money of depositors, and the other financial institutions, which make loans mainly from the money supplied otherwise than by deposits."

The appellant constructs a significant phase of its argument (including that showing the growth of savings and loan associations) on the assumption that § 5219 protects appellant in its competition with savings and loan associations for deposit and savings moneys. The only cases dealing with this question are *Clement National Bank* v.

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[161]

This Court has refused to base discrimination on a mere difference in rate of tax but, instead, has looked to the over all tax burden and the relationship of that burden to the competitive employment of other moneyed capital. The above further illustrates the difference between the nature, financial structure, and purpose of a mutual institution, as compared to a commercial banking institution, and the necessity of handling these differences.

Vermont, (1913) 231 U.S. 120; *People* v. *Goldfogle*, *supra*, (1924) 205 N.Y.S. 870; 123 Misc. 399 (aff'd by App. Div. 211 N.Y.S. 85), and *Hoenig* v. *Huntington National Bank*, *supra*, (1932) (C.C.A. 6th Circuit) 59 F. (2d) 479, cert. denied 287 U.S. 648.

The *Hoenig* case, *supra*, disposed of the "competition for deposits" question as follows:

> "As to the alleged 'competition for deposits,' it is evident from the universal expressions of opinion by the Supreme Court that competition, in the sense intended, is limited to the employment of moneyed capital 'substantially as in the loan and investment features of banking.' Deposits constitute moneyed capital, but national banks are not taxed upon their deposits any more than are savings banks and building associations; and we are here primarily concerned only with what is done with such moneyed capital after it is secured, not with competition to obtain it. There is clearly no distinction in law between the competition for deposits as between national banks and savings banks, and the same competition as between national banks and building associations. Thus *Mercantile Nat. Bank v. New York*, *supra*, seems directly in point on this issue."

or, as otherwise stated in *People* v. *Goldfogle*, *supra*, (1924) 205 N.Y.S. 870, at p 879, 123 Misc. 399 (aff'd by App. Div. 211 N.Y.S. 85):

> "• • • The very depositor in the national bank itself is lending money to the bank, often at interest, but such persons do not actually compete for business with a national bank."

In the *Clement* case, *supra*, 231 U.S. 120, it was argued that Congress in enacting § 5219 exempted national bank deposits from taxation. In concluding that Congress did not so intend, this Court stated, at p 135:

> "• • • With respect to the taxation of depositors' credits, the Federal statute does not prescribe a rule; and, the property being normally subject to the State's taxing power, there is no warrant for implying a restriction which would extend beyond the requirements of protection from the prejudicial effect of such exactions as would be unjustly discriminatory."

These cases would rule out both savings accounts and bank deposits as competing other moneyed capital.[162]

Ignoring such authorities, appellant would prove the existence of substantial competition between noncomparable institutions by attempting to show that the Michigan National Bank employs a part of its assets, represented by deposits, in an area in which savings and loan associations have traditionally done business by employment of their savings account moneys.

Since both are subject to comparable taxation in Michigan, it is immaterial to the resolution of the issue in this cause whether they are **both** considered to be within or without the concept of "other moneyed capital" for § 5219 purposes. This is illustrated by simple propositions that control here:

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[162]

Review of the legislative proceedings pertaining to the 1923 amendment to paragraph (b) of § 5219 indicates that some United States senators asserted in reference to the proposed amendment that it would be absurd to include bank deposits in a national bank within the classification of competing moneyed capital (See 64 Cong. Record 1458 [1923]). The exemption of savings banks by this Court was specifically noted and approved by the House Manager (64 Cong. Record 4802 [1923]).

1. If bank deposits and savings and loan share accounts are considered "other moneyed capital" in competition with investments in bank stock,[163] though there

[163]

Appellant quotes from p 7 of "Hearings Before Subcommittee No. 2 of the House of Representatives Committee on Banking and Currency, Washington, D.C.," on February 16, 1960, and lifts from context certain statements appearing there. In quoting from the statement of the Comptroller of the Currency, appellant failed to note that the Comptroller had stated, on p 6:

"Our banking system today is in a very healthy condition."

and then in reference to the question of competition said:

"In addition to the competition between commercial banks, banks are finding themselves more and more in competition with other types of bank and nonbank financial institutions. Among the other types of financial institutions competing with commercial banks are mutual savings banks; Federal and State chartered savings and loan associations, Federal and State chartered credit unions, life insurance companies, commercial finance factors, fire and casualty insurance companies, personal and sales finance companies, investment companies, corporate pension and profit-sharing plans, production credit associations, and even various agencies of the Federal Government such as the Federal intermediate credit banks, the Farmers Home Administration, and postal savings.

"To illustrate this competition, it is notable that while insured commercial banks increased their savings deposits an estimated $2.1 billion in the year 1959, savings and loan associations increased their share accounts by an estimated $6.6 billion.

"Thus, during 1959 three times as much money was placed in share accounts in savings and loan associations as in savings deposits in commercial banks. In the areas in which they operate, mutual savings banks also are an important competitor for *savings* deposits. Credit unions are making important progress.

"*In the making of loans, all of the organizations above mentioned, except postal savings, are in competition to some extent with commercial banks and are of increasing importance.* * * *"

(Emphasis supplied)

From the Comptroller's remarks (quoted out of context by the appellant) it is clear that the Comptroller was concerned about

might be substantial competition, there is no tax discrimination because national bank deposits and savings share accounts are subject to the **same** tax at the **same** rate.

2. If national bank deposits and savings and loan share accounts are **not** "moneyed capital" within the purview of § 5219, there is no competition between national banking associations and savings and loan associations within the purview of § 5219. This follows from the fact that the appellant does not loan its **capital stock** in the residential mortgage field, but only **deposit moneys.**

Appellees submit that the question of "substantial competition" is a moot question in the instant case, inasmuch as there cannot be "substantial competition" between savings and loan associations and national banks as a matter of law. The existence of factual competition alone, however keen or great in amount, is not sufficient to meet the issue of substantial competition because the very character and nature of savings and loan associations is such that they cannot be said to be in substantial competition in a legal sense.[164] *Facts alone cannot and do not meet the*

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the competition—which is the appellant's real concern in this cause —for deposit moneys and not in the making of loans.

[Appellant indicates on p. 83 of its brief that the Comptroller referred to a specific statement of his deputy. **This is not true.** The Comptroller said only this: "For the information of the committee, I should like to place in the record an address on 'Competition in Commercial Banking' made in 1959 by Mr. L. A. Jennings, First Deputy Comptroller of the Currency, before the Pennsylvania Bankers Association, which goes into greater detail as to the extent to which commercial banks face competition from other types of institutions. * * *" (*Ibid*, p. 7)]

[164]

This explains the rationale of the decisions permitting partial exemption of other moneyed capital for public policy reasons regardless of amount and even though in competition with some phases of the business of national banks.

legal requirements of "substantial competition with the business of national banks:"

First National Bank v. *Hartford, supra,* (1926) 273 U.S. 548,

at p 552:

"• • • The validity of the tax complained of depends upon whether or not the moneyed capital in the state thus favored is employed in such a manner as to bring it into substantial competition with the business of national banks.

"The question thus raised involves considerations *both of fact and of law.* To answer it, it is necessary to ascertain the nature and extent of the moneyed capital in the hands of individual citizens within the state and the relation of its employment, in point of competition, to the business of plaintiff and other national banks [*QUESTION OF FACT*]. It is necessary also to ascertain the precise meaning to be given the statute as applied to the facts in hand in order to determine whether the *particular moneyed capital* and the *particular competition* with which we are here concerned are moneyed capital and competition *within the spirit and purpose of the statute* [*QUESTION OF LAW*]. The question is thus a mixed one of law and fact, and in dealing with it we may review the facts in order correctly to apply the law. • • •"
(Bracketed material and emphasis added)

The *fact* of "competition" is the "nature and extent of the moneyed capital" and the "relation of its employment, in point of competition, to the business of • • • national banks." The *law* of "competition" is "to ascer-

tain the precise meaning to be given the statute as applied to the facts in hand in order to determine whether the particular moneyed capital and the particular competition • • • are moneyed capital and competition within the spirit and purpose of the statute." The *fact* of "competition" is related to a *quantitative* analysis of alleged competition compared to the business of national banks, i.e., the facts involving the nature and scope and detail of competitive activity. The *law* of "competition" is related in a *qualitative* way to the factual competition with the business of national banks in light of the purpose sought to be attained by § 5219. It is the application of the *law* of "competition" to the conclusions reached as to factual competition which determines whether the competition is of such a *character or quality* that it will substantially interfere with the operations and proper functioning of national banks and thus constitute a hostile and unfriendly discrimination against the business of national banks and discourage investments in national bank shares.

Thus, if competition is found to be substantial in amount but not of the kind or quality which evidences an intent to discriminate against investments in national bank shares and thereby create an unfriendly or hostile attitude against the business of national banks and jeopardize the national banking system, such competition is not "substantial".[165]

This was well recognized in

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[165] In some cases the courts have used the phrase "other moneyed capital" as being limited to capital employed in substantial competition with the business of national banks, while, in other cases, the courts have referred to "moneyed capital" as the kind of capital that can compete in a legal sense.

First National Bank of Shreveport v. *Louisiana Tax Com., supra*, (1933) 289 U.S. 60,

and many of the "partial exemption" cases which realistically approached this problem and held that savings and loan associations are of a completely different character than national banking associations and that these differences are such that they cannot come into substantial competition with the business of national banks.

Appellees submit that the law of "substantial competition" dictates that **Michigan savings and loan associations, confined by law to the narrow activity of accumulating share account savings and lending these accumulations for home ownership purposes, are not comparable to national banking associations and, therefore, as a matter of law, cannot be in substantial competition with the business of banking.**

While the dominant theme in the cases excluding mutual savings banks and savings and loan associations from § 5219 is that such mutual thrift societies are entitled to different tax treatment, as a matter of law, because they serve well-established and recognized public policy purposes of encouraging thrift savings and home ownership, these institutions are also excluded in many of the cases because they were not considered *comparable* to national banks and, therefore, were not found to be in *substantial competition* with the business of national banks.

This is illustrated by

Consolidated National Bank v. Pima County, supra, 5 Ariz. 142, 48 P. 291,

decided the same year as *Mercantile National Bank* v. *New*

York, supra, 121 U.S. 138. After review of the prior decisions of this United States Supreme Court, the Court held, (p. 147) on authority of the *Mercantile* case, *supra:*

> "• • • Said building and loan association cannot be compared with a banking association. The exemption or rather the failure to tax the shares of the said building and loan association does not make the tax [on bank shares] in question illegal."

Of like effect and holding are cases such as

Bank of Redemption v. *Boston, supra,* 125 U.S. 60.

In this case, the court considered the nature and character and basic purpose of mutual savings banks, as contrasted to that of national banking associations.

This parallels the reasoning in

Mercantile National Bank v. *New York, supra,* 121 U.S. 138,

where, at p 161, the court stated that:

> "• • •. No one can suppose for a moment that savings banks come into any possible competition with national banks of the United States. They are what their name indicates, banks of deposit for the accumulation of small savings belonging to the industrious and thrifty. • • •"[166]

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[166] The court then excluded such associations from the restraint of § 5219 on the grounds of the public policy question developed above.

This same thought, as shown above, was given specific expression by the courts in

Hoenig v. *Huntington National Bank, supra,* (1932) (C.C.A. 6th Circuit) 59 F. 2d 479;

First National Bank of Shreveport v. *Louisiana Tax Commission, supra,* (1933) 289 U.S. 60;

First National Bank of Glendive v. *Dawson County, supra,* (1923) 66 Mont. 321, 213 P. 1097; and

Merchants' National Bank of Glendive v. *Dawson County, supra,* (1933) 93 Mont. 310, 19 P. 2d 892.

In the *Hoenig* case, *supra,* the court stated in regard to alleged competition of savings and loan associations of Ohio, at p 482:

> "• • • The two types of institutions have essentially different characteristics; the one is purely commercial in character, in which the assets must be kept liquid; the other is sui generis, non-commercial, and without a comparable need for liquid assets. The one is founded and conducted upon banking principles; the other was created in answer to a need which the banks could not and did not satisfy, and in furtherance of a wholesome public policy to promote building, especially the building of homes, and to develop the habit of thrift."

After referring to the earlier decisions exempting mutual savings banks and savings and loan associations, the court concluded in reference to those decisions at p 482:

> "• • • In those cases the fundamental and substantial differences between commercial institutions, such as national banks, and institutions of the in-

surance company, savings bank, and building association types, were the real basis of the finding of want of competition; and our decision of the present issue is *founded upon a recognition of these same differences.*" (Emphasis added)

The above extracts from the *Hoenig* decision, *supra*, show that the court found that the public policy exemption, given expression in the earlier mutual savings bank and savings and loan cases, was founded upon the distinct character of the savings and loan institution, which was not comparable to a national banking association.[167] Upon the same premise, the court also was able to conclude (as the courts have in some of the prior decisions referred to above) that there did not exist substantial competition.

Although we might say that the question of substantial competition between savings and loan associations and national bank associations in some sense poses a question

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[167]

In reference to the content of this statement, appellant takes opposing views in its brief. A substantial part of its argument is directed to the proposition that the nature, character and purpose of competing institutions is immaterial and that the appellees are in error to rely upon *Bank of Redemption* v. *Boston*, *supra*, (1888) 125 U.S. 60, and *First National Bank of Shreveport* v. *Louisiana Tax Com.*, *supra*, (1933) 289 U.S. 60, for the proposition that they are material under § 5219 (Br. 40-41, 64, 78). Appellant would distinguish the *Shreveport* case, *supra*, as dealing with factual competition and asserts that the *Bank of Redemption* case, *supra*, in this particular is overruled by the *Hartford* case, *supra* (Br. 64). Yet, surprisingly, appellant plaintively argues, without any facts to support its argument, that the character, nature and purpose of these mutual thrift institutions has so changed that today they are no longer quasi-public corporations and, thus, their mutual savings shares cannot be taxed by the states any differently than the stock of a commercial national bank (Br. 64-77).

of fact, it is still only a question of fact directed at the essential character and nature of these institutions and not one directed to the immaterial detail of their operations.

If this be not true, then the language and the rationale of all the decisions in reference to the treatment of savings and loan associations and mutual savings banks become a meaningless dichotomy of words. If these decisions speak to anything, they speak to the power of the State of Michigan to exempt or give preferential treatment to savings and loan associations because of their unique character and because of the manifest public policy that they have traditionally served, i.e., the encouragement of thrift and home ownership.

This is completely in accord with the holding of this court in the

First National Bank of Shreveport v. *Louisiana Tax Commission, supra,* (1933) 289 U.S. 60,

at p 64, wherein the court stated:

"• • • If we may take judicial notice of the functions of these alleged competitors of the plaintiffs, there appears ample basis for the classification, among other things, in this: There is a *fundamental* difference between banks, which make loans mainly from money of depositors, and the other financial institutions, which make loans mainly from the money supplied otherwise than by deposits. • • •" (Emphasis added)[168]

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[168]

Appellant urges, on authority of the *Hartford* case, *supra*, 273 US 549, that *factual* competition is controlling and that, therefore,

Ignoring the **law of competition**, appellant nevertheless has attempted to prove the **fact** of substantial competition. Appellees submit that the facts pertaining to competition support the law of competition, namely, that mutual thrift institutions like savings and loan associations do not compete with a significant enough phase of the business of national banks to be in substantial competition as a matter of fact.

As indicated above, the facts establish that appellant does not employ the capital represented by its stock in any competition with the business of savings and loan associations. Even if we assume for argument's sake that the question of substantial competition is limited to the facts concerning the employment of other moneyed capital in

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any consideration of the character of the alleged competing institution is immaterial. This argument begs the question. To be in actual competition, you must be so constituted and organized that factual competition is possible. Can a man without legs compete in a foot race? Thus, if appellant bank is able to receive deposits and to loan these deposits for home ownership purposes, how can an institution that cannot receive deposits and, thus, cannot lend such deposits be in substantial competition with this phase of appellant's business? Competition, it is submitted, relates to the ability of persons to act in the same field of endeavor on comparable terms. If not comparable, how can national banks and savings and loan associations be in substantial competition? This is the basis for the exclusion of insurance companies and general business concerns from the purview of § 5219. It is equally applicable to savings and loan associations in addition to the public policy *partial* exemption rule.

The different and distinct nature and the narrow purpose and activities of the savings and loan associations, as contrasted to the broad monetary and commercial powers and activities of national banks, led Professor Woodworth to conclude that these institutions could not be in substantial competition within the purview of § 5219 (R. 854a-855a). Thus, savings and loan associations are not in a position to challenge competitively the business of national banks

competition with the business of national banks, clearly the substantiality rule requires a factual showing that the competing moneyed capital complained of represents a relatively material part of the total moneyed capital employed in competition with national banks and, further, that such moneyed capital is in competition with a substantial phase of the business of national banks.[169] The latter test is admitted by the appellant—the former it asserts is immaterial under *First National Bank* v. *Hartford, supra*, (1927), 273 U.S. 548.

Appellees' witness Professor George Walter Woodworth, Professor of Finance at the School of Business Administration, University of Michigan, who testified at length concerning the nature and activities and economic structure of commercial national banks, mutual banks, and savings and loan associations, concluded that savings and loan associations were not in substantial competition in a true, factual, or economic sense with appellant or other national banks. Only brief references have been made to it here. Verbatim reading of his testimony clearly indicates the true nature of the competitive situation at bar (R. 803a-910a).[170]

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[169] These were the tests laid down in *Mercantile Nat'l Bank v. New York, supra*, (1887) 121 U.S. 138, and *First National Bank of Guthrie Center v. Anderson County Auditor, et al., supra*, (1926) 269 U.S. 341, and it is submitted that nothing in the *Hartford* case is inconsistent with the requirement that there be a factual showing that a relatively material part of total "moneyed capital" in competition with substantial phases of the national bank business is preferentially treated taxwise.

[170] His testimony is analytical, instructive and informative. It was developed in reference to the specific circumstances of this cause. It was, significantly, the only expert opinion offered at the trial of this cause concerning the comparison between national banks and savings and loan associations.

Professor Woodworth was asked the question:

> "• • • was money invested in share accounts of savings and loan associations in 1952 in competition with the business of national banks within the meaning of Section 5219 of the Revised Statutes?" (R. 852a)[171]

For purposes of the witness' answer, the word "competition" was defined to mean:

> "• • • the extent to which the two institutions, that is the national banks and savings and loan associations are operated in the same areas or fields of financial business?" (R. 854a)

Professor Woodworth answered as follows:

> "In the light of the facts that I developed in my previous testimony, my answer would be no.
>
> "First, the business of national banks in 1952 was predominantly in the monetary field, that is, as creditors, holders, transferers and lenders of money;
>
> "Second, the business of savings and loan associations was predominantly in the field of gathering together thrift savings and lending these accrued savings for home ownership on the basis of long-term residential mortgages;

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[171] Michigan Court Rule 37, § 16, permits an expert witness to be asked the ultimate question of fact.

"Third, the purposes and functions of these two institutions were too different and the area of common operations was too narrow to constitute substantial competition in an economic sense.

"Passbook savings accounts of national banks were about 15 per cent of their total assets in 1952. Residential real estate loans of the national banks were 6 per cent of their total assets in 1952.

"Moreover, the fact that each institution specialized to a high degree in different types of loans in the residential loan field narrowed even further the area of real competition.

"Over three-fifths of residential mortgage loans of national banks at the end of 1952 were guaranteed or insured by FHA and VA. Less than two-fifths were conventional mortgage loans.

"In contrast, only about one-fifth of residential mortgage loans of savings and loan associations were FHA and VA mortgages, the remaining four-fifths were conventional mortgages, almost all of which were made with a longer maturity or were for a larger amount than permitted by law to national banks.

"Attention should also be called to the fact that the scope of competitive operation is much narrower in the field of FHA and VA mortgage loans than in the area of conventional mortgage loans.

"This follows from the fact that government regulations require uniformity in rates, maturities, bases of appraisal, home specifications, and in other respects.

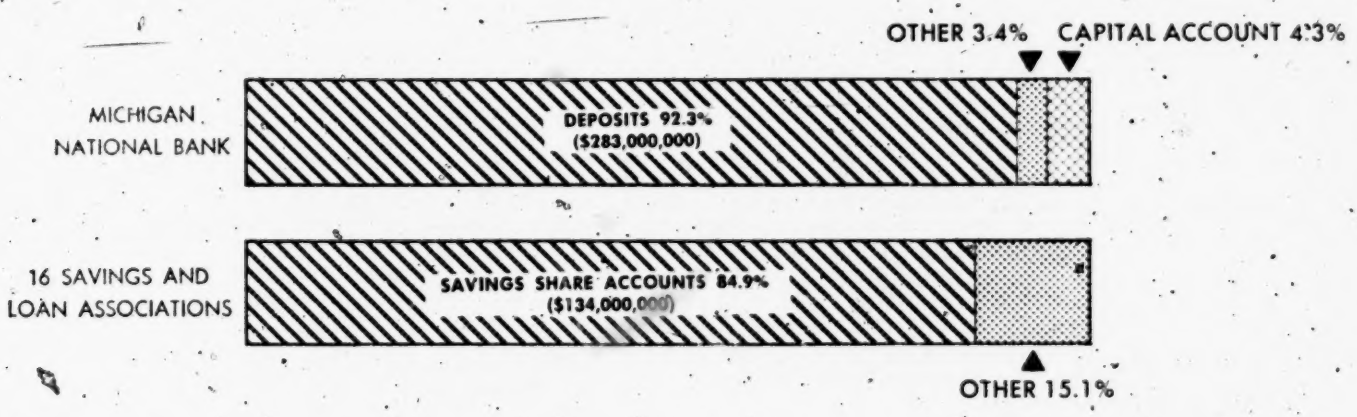
"It is also relevant that the overall competition of savings and loan associations with national banks in the State of Michigan were substantially less than in the United States as a whole.

"• • •" (R. 854a-855a)

ADDITIONAL FACTS AS TO ALLEGED COMPETITION

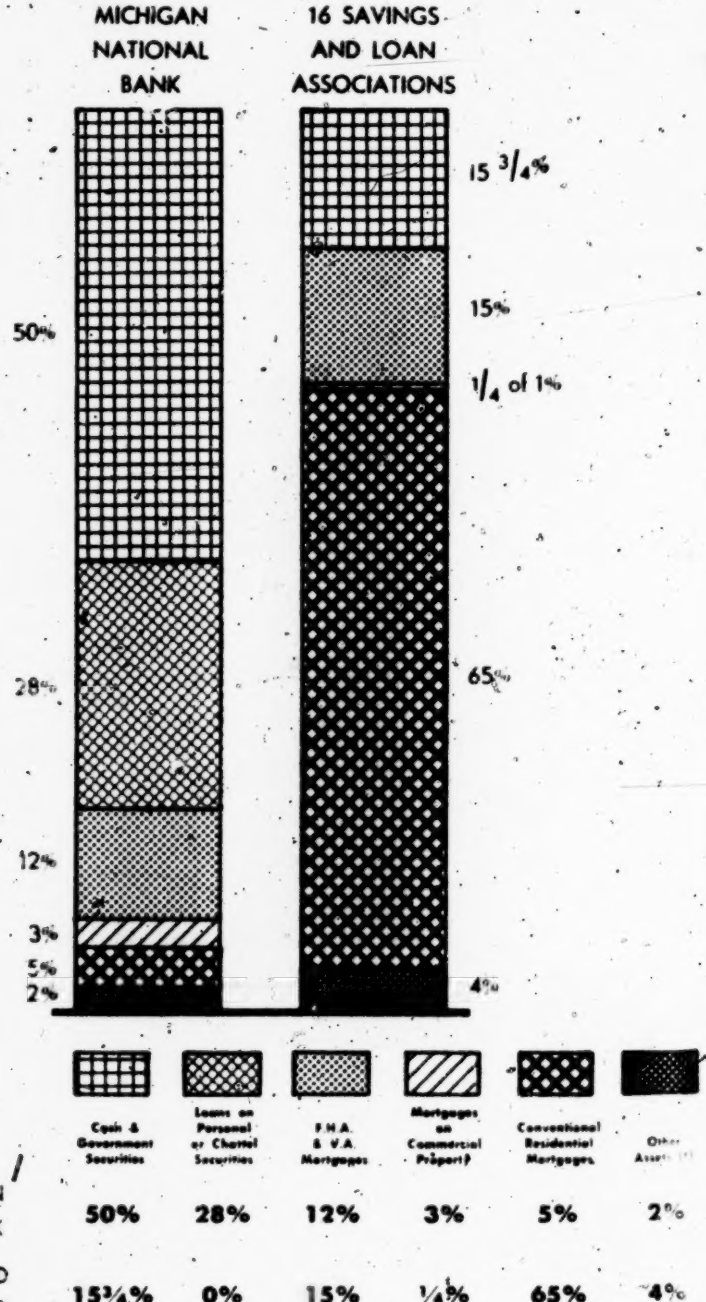
The following additional facts concerning the appellant bank and the allegedly competing 16 savings and loan associations, and the following charts displaying some of those facts graphically, establish the lack of substantial competition in a factual sense.

Graph Reflecting the Source of Assets of Michigan National Bank and 16 Savings and Loan Associations for the Year 1952



(Pl. Ex. 3; R. 529a, 631a; Df. Ex. 209; R. 748a, 1273a-1274a).

Graph Reflecting Employment of Assets of Michigan National Bank and 16 Savings and Loan Associations for the Year 1952 in Order (Top to Bottom) of Liquidity.



	Cash & Government Securities	Loans on Personal or Chattel Securities	F.H.A. & V.A. Mortgages	Mortgages on Commercial Property	Conventional Residential Mortgages	Other Assets
MICHIGAN NATIONAL BANK	50%	28%	12%	3%	5%	2%
16 SAVINGS AND LOAN ASSOCIATIONS	15¾%	0%	15%	¼%	65%	4%

(Df. Ex. 209C; R. 714a, 1261a; Df. Ex. 209; R. 748a, 1273a-1274a; Df. Ex. 215; R. 757a, 1280a; Df. Ex. 224B; R. 838a, 1290a; Pl. Ex.

An investment in appellant's bank stock is not comparable to an investment in a savings and loan association share account (R. 849a, 850a). The first is primarily an equity investment and the latter, a savings investment (R. 850a, 851a). Investments in national bank stock are not insured by any federal agency, while investments in savings share accounts, up to $10,000 in amount, are insured by the Federal Savings and Loan Insurance Corporation (R. 851a). The appellant faced no competition in obtaining share capital in 1952 (R. 676a). While appellant was permitted to engage in all the activities permitted national banking associations, including the ability to create checkbook money and receive time, savings and demand deposits) savings and loan associations were able to engage solely in the narrow activity of making first mortgage loans secured by residential properties (with minor exceptions) or loans on the security of its savings shares accounts (R. 854a, 855a). To carry on their business, these associations were able to use, as investment funds, only their savings share account moneys, reserves, undivided profits, and limited loans[172] while appellant bank was able to use its capital account of approximately $13 million plus $283 million of deposits, representing over 92% of its total assets (Df. Ex. 202, R. 672-673a, 1262a, 1263a; Df. Ex. 209, R. 748a, 1274a; Pl. Exs. 36-A through 36-J, R. 147a, 979-988a; Pl. Ex. 45-A, R. 191a, 1007a; Pl. Ex. 61-F, R. 336a, 1017a; Pl. Ex. 73-E, R. 451a, 1126a; Pl. Ex. 77-E, R. 452a, 1159a; and Pl. Ex. 81-E, R. 453a, 1193a). By the use of such deposit moneys as part of its usable or working capital, the appellant bank was able, in 1952, to receive gross earnings in excess of 91% of its total capital account—approximately $12 million as compared to approx-

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[172] These associations could borrow limited amounts from the Federal Home Loan Bank Board.

imately $13 million (Df. Ex. 202, R. 672a, 1262a, 1318; Df. Ex. 205, R. 672a, 1266a, 1267a). On the other hand, the gross earnings of savings and loan associations amount to 5% of their total share accounts (Df. Ex. 209, R. 748a, 1273a, 1274a; Df. Ex. 210, R. 748a, 1275a, 1276a).

In 1952, the appellant showed an operating profit before taxes of $5,300,000 annually approximately double the average rate for all national banks (R. 1322); it was able to retain approximately $2 million thereof as additional capital after payment of taxes, dividends and interest—likewise, approximately double the average rate for all national banks (R. 1322).

Further, by employment of approximately 22% of its assets, appellant in 1952 was able to loan on the security of real estate approximately five times the total value of its capital account, which total investment returned about 22% of its total gross earnings (Df. Ex. 212, R. 749a, 1278a; R. 762a, 905a). The deposits of appellant bank represented over 200% of the total share accounts of the sixteen savings and loan associations (Df. Ex. 202, R. 672a, 1263a, 1319; Df. Ex. 205, R. 672a, 1266a; Df. Ex. 209, R. 748a, 1273a).

Appellant was able to make total loans in excess of $148 million and total loans secured by real estate in excess of $62 million. This loan activity included loans of diversified type and character, including loans to individuals on security of their financial statements and installment loans (the latter accounting for over $5 million of income in 1952). The activity of savings and loan associations was primarily limited to the conventional residential loan field, in which area appellant loaned only about $15,000,000 of its total assets of over $306,000,000. In addition, appellant loaned some $35,000,000 secured by the Federal Government (F.H.A. and V.A.). The savings and loan associations involved, how-

ever, participated only in a minor way in the F.H.A. and V.A. mortgage fields. Nine of the associations did not make F.H.A. mortgages and six of the associations made no V.A. mortgages (Df. Ex. 200C, R. 714a, 1261a). The specialization by the appellant bank in the federally guaranteed home mortgage field is explained by the liquid nature of such investments as compared to conventional mortgages. On the other hand, specialization by the savings and loan associations in the conventional field is explained by the greater flexibility of these mortgages and the lesser liquidity requirements of these associations (R. 841a).

The concentration by the savings and loan associations in the conventional loan field was in an area prohibited to national banks by Congress. Only 6.4% of the total conventional loans made by the sixteen associations were for a term and an amount within permissible investments by appellant bank (Df. Ex. 200, R. 714a, 1258a). Approximately 2% of this 6.4% was in the individual home construction field, and appellant's witness Fairles could not recall having participated in this field in any significant way (R. 674a, 675a). To the extent they constituted loans other than for home purchase or construction, the "other purpose loans" (referred to on the reports of the savings and loan associations and on Df. Ex. 200C, R. 714a, 1261a) were not the type of loans that appellant bank secured by a first mortgage on real estate. The home improvement loans of the sixteen associations (amounting to .5% of total loans) were secured by first mortgage loans.[173] The appellant bank made no such improvement loans in 1952.[174]

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[173] Three associations did make F.H.A. Title I and Title VIII improvement loans in the amount of approximately $293,000, representing an insignificant fraction of the total loans made.

[174] F.H.A. improvement loans are guaranteed by the Federal Government and are not secured by real estate mortgages.

Most of the loan activity of the bank was of a type that savings and loan associations could not make because their loan activity was limited to loans secured by first mortgages on real estate or savings share accounts.[175] Na-

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[175]

Of the total mortgages recorded in Michigan in 1952, 24.3% were made by savings and loan associations (R. 855a). In the entire United States the comparable proportion was 35.8% (R. 855a). During that year, the sixteen associations doing business in the same cities as appellant bank made total *commercial* loans secured by business properties amounting to $293,000 — *one-third of one per cent of their total real estate loans or about one-quarter of one per cent of their total assets* (Df. Ex. 200C, R. 714a, 1261a). Appellant bank on the other hand, made approximately $8 million of such loans, which constituted 13% of its total real estate loans and was in excess of 2½% of its total assets.

Of loans made by the saving and loan associations practically all (99⅔%) were secured by residential real estate, while only 87% of appellant's mortgage loans were so secured. Of these 87%, 70%, or ⅘ (R. 842a) were guaranteed by the Federal Government as F.H.A. and V.A. loans.

Therefore, only 26% of appellant's mortgages were *conventional residential non-business mortgages*, 61% were guaranteed F.H.A. and V.A. mortgages, and 13% were mortgages on commercial property.

The sixteen associations, on the other hand, carried F.H.A. and V.A. loans amounting to only 19% of total loans (841a; Df. Ex. 200C, R. 714a, 1261a), *conventional residential non-business loans* amounting to 81% of their total loans, and mortgages on commercial property being practically nil (⅛ of 1%).

The total loan activites engaged in by the institutions illustrate different objectives. Only 42% of appellant bank's total loans were secured by real estate, while 58% were not so secured (Pl. Ex. 4C, R. 537a, 948a). All of the associations' loans were secured by real estate (Df. Ex. 202, R. 672a, 1262a, 27b).

As an illustration, 100 average borrowers from appellant in 1952 consisted of 29 persons acquiring F.H.A. and V.A. loans, 5 businessmen putting up commercial property as security, 8 persons acquiring conventional residential mortgages, 5 persons getting a home improvement loan, and 53 persons acquiring loans on personal, business, or chattel security. Of 100 average borrowers from savings and loan

tional banking associations and savings and loan associations in 1952 did not occupy any different position in terms of their activities and fiscal significance than they did historically. National banks generally made the same type of loans historically as they did in 1952, with the exception of the evolution of particular loan policies dictated by Congressional mandate. For example, national banks have traditionally loaned money on the security of real estate, including residential properties, since 1916. However, the terms and conditions of such loan activity changed, as the conditions relating to the need of the bank for liquid funds changed, primarily through the increase of deposit money of less than demand nature (R. 818a-820a). The loan policies of both institutions, however, were changed by the direct action of the Federal Government in the home loan mortgage market by inauguration of the F.H.A. and V.A. programs. These changes in loan policy did not change the essential nature and character of either institution. Savings and loan associations were still left to operate almost exclusively in the home finance field, and national banking associations were still primarily discharging monetary functions with their loan activity more pronounced in the short-term loan field than in the residential mortgage market (R. 818a-823a, 854a, 855a).

This was true of the appellant bank and the associations in question, for the year 1952, as evidenced by the fact that their activities did not materially overlap.

In the last analysis, savings and loan associations *cannot be in "substantial competition with the business of na-*

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associations in Michigan in 1952, 19 persons were aequiring F.H.A. and V.A. loans, 81 persons were acquiring conventional residential mortgages, and there were no borrowers on personal or chattel security or commercial real estate.

tional banks" because they cannot and do not engage sufficiently in the activities characteristically carried on by the national banks. Stated another way, if they are not comparable institutions in substance, how can they be in substantial competition?[176]

6.

MISCELLANEOUS CONSIDERATIONS

A. A SAVINGS AND LOAN SHAREHOLDER IS NOT A STOCKHOLDER.

The appellant rests its entire argument on the premise that a savings and loan association share is the same as a share of stock in a commercial corporation such as a national bank. To prove this, appellant refers to arbitrary concepts and inappropriate terminology. In substance, a share of national bank stock is not analogous or comparable to a savings share account in a mutual savings and loan association. Professor Woodworth concluded that it was completely absurd to compare the two for tax purposes

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[176]

This conclusion is not at variance with the *Hartford* case, *supra*, (which is comparable to the *Boyer* cas , *supra*), since in *Hartford* the exemptions were so broad that the institutions exempted *collectively* could compete with the substantial business of national banks. In fact, such an interpretation of "substantial competition" indicates that partial exemptions are justified as a matter of law because these exemptions (however large in amount) are not discriminatory or hostile and do not interfere with the business of banking. On the other hand, hostile exemptions as in the *Boyer* and *Hartford* cases, *supra*, are not permissible because collectively (a measure of quantity) they can disrupt and interfere with the business of national banks and because, *qualitatively*, the exempt institutions carry on most of the phases and activities of the business of national banks.

and specifically noted the following differences between a savings share account and a share of national bank stock (R. 849a-851a).

"Savings share accounts are unlike shares of national bank stock in that they represent a small personal indirect investment in the mortgage portfolio and other assets of a savings and loan association with no prospect of appreciation in value of the principal.

"In contrast, shares of national bank stock represent a risk-taking venture, motivated by the expectation of making a business profit. If successful, the owner of the national bank shares may realize not only current cash dividends, but large appreciation in value per share.

"For example, the investor who bought 100 shares of stock in the Michigan National Bank in 1941 for $1,700, as noted, according to the record, at $17 per share, received a cash dividend in each year through 1952.

"In addition, he received 2.33 shares of stock dividends during this period, so that he had 333 shares in 1952. These shares were quoted at $34 to $36 a share in 1952, so that using $35 as the mean of those two figures, the value of the principal had risen from $1,700 to about $11,655, an appreciation of $9,955 or 586 per cent.

"Q. Contrast this with a savings and loan share account investment.

"A. Right along a little further, this example that I have just cited of large appreciation in the value of

national bank shares suggests another difference between these shares and savings share accounts.

"The large increase in net profit per share of Michigan National Bank was possible because for each dollar of capital stock, surplus, and undivided profits the bank had approximately $20 of assets, the bulk of which was represented by debt to depositors.

"This is what is often called 'trading on the equity.'

"Savings share accounts cannot be used to trade on the equity in this manner. At the end of 1952, total savings share accounts were 84.7 per cent of total assets of all savings and loan associations in the United States, as shown by Exhibit 224.

"On the same date, the proportion of capital stock, surplus, and undivided profits to total assets of all national banks was 6.4 per cent, and this proportion in Michigan National Bank was 4.8 [Pl. Ex. 3; R. 529a, 931a indicates this figure is 4.2%] per cent.

"And third, I would point out that savings accounts or share accounts of savings and loan associations are unlike shares of national bank stock in that these accounts are always open to receive small additional amounts from savings customers and the associations stand ready to return these dollars and no more to customers on request on thirty days' notice, and usually on demand, in fact. This permits the general public always to participate on equal terms with existing share account holders.

"Not so with shares of a national bank. The number of such shares is fixed for long periods, and is changed only after formal approval by a vote of the stock-

holders. The owner of national bank shares cannot turn them in to the bank for redemption at a fixed value. He can convert them into cash only by sale, usually through a security dealer, in the over-the-counter market, such shares not being listed on organized stock exchanges.

"In contrast again, savings share accounts are not bought and sold in the market at varying prices. The amount and value in one's account remains the same except as increased by additions from savings or as reduced by withdrawals, except in the unlikely contingency of liquidation of a solvent association.

"Fourth, most savings and loan share accounts are insured by the Federal Savings and Loan Insurance Corporation. Unlike this, national bank shares of stock are not insured; in fact, were subject to double liability up to July 1, 1937, following an amendment to the National Bank Act in 1935. It is the deposits of national banks that are insured by the Federal Deposit Insurance Corporation.

"Thus, the basic comparability of savings share accounts and deposits which I have just established were recognized by Congress in its legislation to protect owners of savings share accounts and owners of deposits."

Other significant characteristics of savings shares that distinguish them from bank stock may be noted:

1. Limitations exist on the voting privileges of any member, irrespective of the number of shares.

2. Voting privileges are given borrowers who have no real interest in the association except in that capacity.

3. A saver enters into a contractual relationship with the association, one privilege of which is the provision for withdrawal and the liability for penalties imposed by the association.

4. Savings accounts have a fixed dollar value withdrawable on demand.

5. The withdrawal price is limited to paid-in value plus earnings required by statute to be distributed as dividends.

B. THE HARTFORD CASE.

Appellant relies *exclusively* on the case of *Hartford, supra,* 273 U.S. 548 to support its argument in this cause. This case does not support the appellant's argument any more than the cases that the court relied upon for decision in the Hartford case, including the leading cases of *Mercantile National Bank* v. *New York, supra,* 121 U.S. 138, and *First National Bank of Guthrie Center* v. *Anderson, supra,* 269 U.S. 341.

A careful analysis of the *Hartford* decision, *supra,* amply demonstrates that it only applies principles well established since the *Mercantile* case, *supra.* The *Hartford* case, *supra,* is closely analogous to the case of *Boyer* v. *Boyer, supra,* 113 U.S. 689. It *supports* the cases allowing "partial exemptions" for public policy reasons and it does not establish any different test in determining discrimination or "substantial competition" than do the numerous other decisions referred to in this brief.

The conclusions reached by the court in the *Hartford* case, *supra,* must be gleaned from the language employed or the exact holding expressed.

Some of the salient facts in the *Hartford* case, *supra,* were as follows: Real estate firms located in the *vicinity* of plaintiff bank loaned $250,000 to $300,000 annually in the area, which afforded the same competition to the plaintiff as loans made by other banks. Said local condition existed throughout the state. Also, various individuals, co-partnerships and corporations in the vicinity of plaintiff engaged in the business of acquiring and selling notes, bonds, mortgages and securities and employed substantial capital in carrying on their business. Other individuals, co-partnerships and corporations located in Milwaukee and in Chicago, were engaged in the business of buying and selling securities both in the vicinity of plaintiff bank and elsewhere and employed capital for that purpose. The securities acquired and offered were those that could be handled by the plaintiff bank.

The court made no further reference to the character and nature of the other capital that was competing with the bank. It is a fact, however, that *all other moneyed capital* existing and employed in Wisconsin, was assumed to be preferentially treated. Therefore, the national bank shares constituted the *only* moneyed capital subject to tax in Wisconsin. The exemption under the *Hartford* case, *supra,* therefore, was broader in scope than the exemption held to be invalid in *Boyer* v. *Boyer, supra,* and was broader than the across-the-board exemptions held invalid in other § 5219 share tax cases.

It is to be noted that the court in the *Hartford* case, *supra,* relies upon

First National Bank v. *Anderson, supra,* 269 U.S. 341, and

Mercantile National Bank v. *New York, supra,* 121 U.S. 138.

In arriving at its decision, the Court states as follows, at pp 557-558:

"• • • No decision of this Court appears to have so qualified § 5219 as to permit *discrimination* in taxation in favor of moneyed capital *such as is here contended for.* • • •" (Emphasis added)

First National Bank v. *Hartford, supra,* (1926) 273 U.S. 548,

is consistent with the *Mercantile National Bank* case, *supra,* which was cited extensively throughout the opinion. The court thus left undisturbed the principle that *partial exemption,* based upon public policy, is permissible.[177] It strengthened and clarified this principle by *holding that a total exemption of all other moneyed capital in the guise of numerous specific partial exemptions,* constitutes a violation of § 5219. By thus singling out national bank shares for taxation, it could be said, borrowing the language of

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[177]

The principle is consistently applied and followed in the decisions subsequent to *Mercantile, supra.* See *First National Bank of Shreveport* v. *Louisiana Tax Commission, supra,* (1933) 289 US 60; *Consolidated National Bank* v. *Pima County, supra,* 5 Ariz 142, 48 P 291; *Hoenig* v. *Huntington National Bank, supra,* (1932) (CCA 6th Circuit) 59 Fed 2d 479, and especially *Merchants' National Bank of Glendive* v. *Dawson County, supra,* (1933) 93 Mont 310, 19 P 2d 892, decided in the light of the *Hartford* case, *supra.*

Clement National Bank v. *Vermont*, *supra*, 231 U.S. 120, 135,

"• • • that the measure adopted [Wisconsin bank share tax] is essentially inimical to national banks, frustrating the purpose of the national legislation, or impairing their efficiency as federal agencies. • • •" [Bracketed material added]

The court, in the *Hartford* case, *supra*, stated at pp 560 and 561:

"• • • a consideration of the entire course of judicial decision on this subject can leave no doubt that state legislation and taxing measures which by their necessary operation and effect *discriminate* against capital invested in national bank shares *in the manner described* are intended to be forbidden. • • •" (Emphasis added)

The Court found, at pp 557 and 558, that

"Competition may exist • • • *serious in character* and therefore well within the purpose of § 5219, even though the competition be with some but not all phases of the business of national banks. Section 5219 is not directed merely at discriminatory taxation which favors a *competing banking business.* • • • *With the great increase in investments* by individuals and the growth of *concerns engaged in particular phases of banking* • • • discrimination with respect to *capital thus used* could readily be carried to a point where the business of national banks would be seriously curtailed. • • •" (Emphasis added)

The above-quoted language of the Court was in answer to the Wisconsin court's holding that § 5219 was not violated *unless such exempted institution was able to carry on a general banking business.* The Court noted that the holding of the Wisconsin court could defeat the purpose of § 5219 by complete exemption of all other moneyed capital, which collectively was employed in all phases of the banking business with the exception of receiving deposits which were restricted to banks. The Court was thus concerned with the *collective* competition which was "serious in character" and which might seriously curtail national banking business. *The exemption of* "concerns engaged in particular phases of banking" *though not engaged therein as competing banking businesses* operating in all phases of such business, *was a violation of § 5219 since the aggregate of the numerous exemptions was equivalent to a total exemption of all other moneyed capital.*

The *Hartford* case, *supra*, therefore, did not purport to make new and divergent law.[178] It is analogous and comparable to *Boyer* v. *Boyer*, *supra*, and holds only that a complete exemption of other moneyed capital is too broad, that the partial exemption rule was not applicable to the facts of the case, and the "substantial competition" re-

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[178] As indicated by the Trial Court below (96a-97a):

"The Hartford case has already been discussed and as pointed out, while the state court specifically dealt with the effect of competition with building and loan associations, the Supreme Court based its decision on the basis of competition with real estate firms and individuals and did not mention the building and loan associations and did not discuss, much less overrule, the savings bank cases."

quirements (as previously developed by the case law) were properly supported.[179]

C. GAPS IN APPELLANT'S CASE.

The Court's attention is directed to the following unsubstantiated inferences and erroneous assumptions, among others, in appellant's brief:

(1) That F.H.A., V.A. and conventional loans were competitive with each other for the favor of both the borrower and the lender (Br 15, Footnote 27). This is in error because there is no proof that either the conventional loan properties or the conventional borrowers could qualify for F.H.A. or V.A. approved loans.

(2) That conventional loans made by savings and loan associations, which appellant bank could not have made because of the term and percentage of appraised value, are comparable and competitive with the loans which appellant bank could have made (Br 15, Footnote 27).

(3) That the average conventional loan, term and percentage of appraised value for three associations (PL Ex's 106, R. 914a, 1255a; 107, R. 914a, 1256a; 108, R.914a, 1257a)

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[179]

The appellant also relies on the cases of *Commercial National Bank* v. *Custer County*, 275 US 502, and *First National Bank of Shreveport* v. *Louisiana Tax Commission*, 289 US 60. As to these cases [*Hartford, Custer and Shreveport*], the trial Court properly concluded (R. 100a):

"I, therefore, find nothing in the decisions of the Hartford, Custer and Shreveport cases which justified the conclusion that the Supreme Court has departed from the established law announced in the savings bank cases and applied in the Hubbard and Hoenig cases * * * ."

are typical of the sixteen associations in question (Br 15, Footnote 27). This is completely unsupported.

(4) That there was competition *within* the meaning of § 5219 in the F.H.A. and V.A. fields. This statement is in error. These loans were government controlled, sponsored and insured. *The same types of public policy considerations that permit the preferential treatment of goverment securities* under § 5219 removes these mortgages from § 5219 competition. [180]

(5) That refinancing transactions evidence competition (Br 13). Quite to the contrary, such transactions establish that the savings and loan associations and appellant bank were engaged in *complementary* loan activity that served *different* needs.

(6) That the object and purpose of savings and loan associations entitling them to public policy consideration, can be swept aside by reference to alleged changes in the minute details of their operations and organization. This is contrary to the established case law.

(7) That savings banks and savings and loan associations in 1900 and before employed their capital in a quasi-charitable manner exclusively for the benefit of the poorer class to aid them in accumulating small deposits and building homes; that no other institutions, including national banks of that day, could perform either of these functions; and that these functions constitute the only "just reason"

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[180]

See, for example, cases such as *Mercantile National Bank* v. *New York, supra*, 121 US 138, 161, 162; *People* v. *Commissioners, supra*, 71 US 244; and *Des Moines National Bank* v. *Fairweather, supra*, 263 US 103.

which could be assigned to support the claimed exemption rule of the pre-1900 United States Supreme Court cases (Br 66-76). There is *absolutely* nothing in the record of this cause to support this statement. The legislation creating these institutions is not so restricted or phrased.[181]

(8) That the modern shareholder (Br 71-73) and borrower (Br 74-76) of a savings and loan association is different from the shareholder and borrower of 1900. Again, there is absolutely no evidence to support this statement.

(9) That the difference in character of savings and loan associations and national banks does not justify the exemption from § 5219 of moneyed capital employed by them in competition with the business of national banks. Here, appellant places itself in the position of being able to determine public policy. It thus illustrates the basic fallacy in its case, i.e., that it can decide whether Congress and the Michigan legislature have the right to determine whether a "just reason" exists for the tax treatment in question.

(10) That the modern associations are no longer mutual (Br 74-76). All the proof is to the contrary (898a).

(11) That the manner in which modern savings and loan associations employ their capital is identical to the way modern national banks employ a large and substantial part of their capital (Br 77). The record clearly shows that the appellant loaned its *deposit* money—and not its *capital* account—in the real estate investment field.

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[181]

The *Mercantile, Bank of Redemption*, and *Hoenig* records, *supra*, indicate that the nature of these institutions and their activities in 1952 were the same as in the periods involved in such cases.

CONCLUSION

This brief has been primarily directed to an analysis of the share tax cases interpreting and applying § 5219 in an effort to determine the validity of the state tax imposed by PA 1953, No. 9, on national bank shares.

It has been demonstrated that not a single case would support a finding that this share tax on national banks is violative of the prohibition contained in § 5219, irrespective of tax treatment accorded savings and loan associations in Michigan. PA 1953, No. 9, which imposed for the year 1952 a tax of 5-½ mills on bank shares, valued by the capital account of the bank, does not violate § 5219.

To the contrary, the cases have constantly affirmed the rule of *partial exemption* and, without exception, applied it to savings and loan associations. The leading case of

Mercantile National Bank v. *New York, supra,* 121 U.S. 138,

approved and quoted at length by all subsequent decisions interpreting the share tax portion of § 5219, applied the rule of partial exemption to mutual savings banks, and

Mercantile National Bank v. *Hubbard, supra,* (1899) 98 F. 465,

applied the rule to savings and loan associations.

As an explanation of, and in support of, this rule of *partial exemption* in its application to mutual thrift institutions, the courts have uniformly made reference to two things, i.e., first, the *public policy* basis of the rule of *partial exemption;* and, second, the noncomparable, non-

competitive character of these institutions when contrasted with national banking associations.

This particular treatment of savings and loan associations and mutual savings banks is well founded in public policy areas other than those dealing with taxes. This is clearly evidenced by Congress' participation in the creation and fostering of these institutions (both state and federal) and its continued participation and involvement in the home-ownership field.

The appellees offered the trial court expert testimony and carefully drawn exhibits to show that the economic burden imposed on these two institutions by the state of Michigan is substantially identical. By any sound comparison, *there is no detriment to the plaintiff banks, its business or stockholders*, which operates in a discriminatory or harmful manner. The appellant has produced no witness nor any exhibit to prove the fact of alleged discrimination; it has rested its case solely on the automatic application of the "rate" of taxation. The cases decided under § 5219 do not require this Court to be blind to the economic realities of a tax.

It is respectfully submitted that, as a matter of law, the following conclusions are required:

(1) Savings and loan associations are entitled to exemption or preferential treatment under the partial-exemption rule.

(2) Savings and loan associations cannot be deemed in "substantial competition" with the business of national banks within the meaning of § 5219 because such associations operate in a field too narrow and restricted and are

too different in character, purpose and organization to be in such competition with national banking associations.

(3) The legislative history of Congress in creating the National Banking System and other financial institutions, including federal savings and loan associations, manifests a congressional intent to treat savings and loan associations, both state and federal, as distinctly different institutions from national banks for taxation purposes. This is also affirmed by its own tax treatment of savings and loan associations.

Additionally, the evidence in this case supports the following factual conclusions which would, alone, dispose of this case:

(1) There is no showing that the money employed by savings and loan associations in Michigan or in appellant's "competitive" area in 1952 is a substantial part of the *total* moneyed capital employed in such localities.

(2) The savings and loan associations in question were not in "substantial competition" with the business of appellant bank because of limited and restricted competition within the narrow and well-defined field of home financing, further restricted by the specialization of each type of institution in particular mortgage activities.

(3) The Michigan tax system does not subject national bank stock to hostile or unfriendly discrimination as compared to the tax imposed upon savings share accounts. It does not impose a greater tax burden on national banks than it does on savings and loan associations. Michigan's tax system has subjected economic and competitive equivalents to tantamount exactions for defraying the cost of government.

The concluding remarks of the Michigan Supreme Court (R. 1358, 1359) read as follows:

The record in this appeal discloses that Michigan building and loan associations operated in a narrow, restricted field, are markedly different in character, purpose and organization from national banks, and are not in "substantial competition" with national banks.

The record establishes that there was practical equality of the total tax imposed upon building and loan associations and upon national banks, and any difference would be justified as partial exemptions under the decisions of the supreme court of the United States quoted above. The restriction contained in RS § 5219 has to do with the actual incidents and practical burden of the tax imposed. (See *People* v. *Weaver*, 100 U.S. 539 [25 L ed 705].)

Appellant, as a taxpayer claiming immunity from the tax, had the burden of establishing its right to the exemption. There is no presumption of unlawful discrimination or that Michigan PA 1953, No. 9, imposed a tax "at a greater rate than [was] assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks." To meet this test, appellant had to introduce proof that was "manifest." (See *Hepburn* v. *School Directors*, 23 Wall, [90 U.S.] 480 [23 L. ed 112], and *Norton Company* v. *Department of Revenue of Illinois*, 340 U.S. 534 [71 S. Ct. 377, 95 L. ed 517].) Plaintiff filed to meet this burden of proof.

We reiterate and approve the finding of the trial court:

> "That Michigan's tax treatment of savings/building and loan associations is based upon just cause and does not evidence an intent to create or foster a hostile or unfriendly discrimination against national banks."

RELIEF

It is respectfully submitted that this Court affirm the judgment of no cause of action of the Supreme Court of Michigan (R. 1359) of February 25, 1960, in favor of the appellees and against the appellant.

Respectfully submitted,

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For Appellees.

The Capitol, Lansing, Michigan

ADDENDUM A

HOENIG EXTRACTS

TESTIMONY BEFORE THE SPECIAL MASTER, ON NOVEMBER 28, 1927.

Testimony of Baldwin Gwinn Huntington

[107R] • • • I am Vice-President of the Huntington National Bank of Columbus, Ohio. • • • [108R] • • •

• • •

I am moderately familiar with the practices of building and loan associations in Columbus. They are in very much the same business that the banks are. They receive deposits; they allow interest on moneys that the public may leave with them as the banks do; they lend moneys to the individuals or to the public as the banks do; they exercise such other functions as renting deposit boxes; they purchase bonds in the market, banks do the [109R] same; they make real estate mortgage loans, banks do the same. • • • I understand that building associations do not confine their loans to those who are stockholders in the association and that they receive deposits from the general public—any one who comes in with money to deposit. With respect to how they are housed, they vary greatly in that matter but the larger associations in Columbus all have what they call fine bank buildings. • • • I think there are two just across the street from each other that are just about the same size and some five or ten stories in height. • • •

• • • [110R] • • •

Building associations in Columbus do not confine themselves to loans on homes. I am not familiar with their country loans, but they do loan on downtown commercial buildings. I know of one instance of a construction loan that has run over $300,000. on North High Street and it is about to be completed. I think the contract is for $330,000. That is a commercial building with store rooms and I believe for hotel purposes above.

• • •

Testimony of Frank L. Stein

[115R] I have been president of The Ohio National Bank of Columbus for eight years. • • • We sometimes loan upon mortgages as collateral security. I would say probably as high as 10 per cent of our loans are made either upon mortgages as collateral securities or upon mortgages direct, the same effect as far as the borrower is concerned. • • •

Testimony of Leslie P. McCullough

[123R] I am and have been president of the Buckeye State Building and Loan Company for about three and one-half years. • • •

• • • [126R] • • •

• • • Our depositors are accorded the privilege generally speaking of making withdrawals at any time. Though we have the right to do so, we have never up to this time felt it necessary to suspend that privilege. We advertise that as one of the beneficient features of our institution. I do not know that that is an important factor in the successful conduct of a building and loan association. I do regard it of sufficient importance to advertise it constantly. We

loan money on real estate—improved property for the most part. Oftentimes there are tracts, farm property of which much of it is not improved. There is a house, a great portion of it is not improved. I do not know what you term "improved property". We have loaned on vacant lots. We do not loan on tracts of land that are undergoing development and making streets. We loan on business property and on property that would be in the commercial or business area of the city—on any good substantially improved type of property that we regard as ample security to protect the funds that we let the borrower have.

• • • [128] • • •

• • • We operate a safe deposit box department and rent safe deposit boxes to the general public. We have a regular business room. I do not know whether you would call it handsome or not. • • • We are located in the heart of the business district of Columbus. We are erecting a new building fifteen stories high. • • •

Testimony of Edwin F. Wood

[135R] • • • I am secretary of the Ohio State Savings Association, a corporation organized under the building association laws of this State. • • •

• • • [137R] • • •

• • • It is for other people to say whether our building is handsome or [138R] not. • • • We lend money on homes and apartments, • • • We have a very few so-called straight loans. The majority of loans made by our company are in real estate security. • • • We would renew a straight loan at maturity if the security was still good and the loan had not been repaid.

Testimony of John Zuber

[139R] • • • I am Secretary of the Franklin Loan and Savings Company. • • • We consider that each borrower signs for a share and pay just a partial amount, $1.00. We do not require borrowers to pay more but some do pay more. When the loan terminates, we give them the privilege of cashing it or in cancelling it with us. • • •

Testimony of L. H. Godman

[151R] I am secretary of the Adelphi Building, Loan and Savings Company, • • •. This institution receives deposits from people who are not its stockholders. If has received deposits of public funds from the City of Columbus. • • •

Testimony of Harley D. Culp

[152R] I am connected with the Hilltop Building and Loan Association, • • •.

• • • Each borrower had subscribed for one share of stock of the par value of $100.00. We did not require them to pay the whole $100.00 in. We required them to pay $1.00 on their subscription and when they paid out the loan, we gave them credit for it, or returned the $1.00 in cash with dividends at 6 per cent. • • •

Testimony of W. L. Van Sickle

[153R] I am engaged in the building and loan business in connection with The Columbian Building and Loan Company. • • •

• • • [157R] • • •

• • • When we had surplus funds, we loan on other classes of property, and have no limit as to the amount of loan we make on business property. We always give first preference to home builders and second to home buyers. The other classes on which we loan are apartments, sometimes on business properties, but we have very few loans on business property. We have loaned $100,000., $200,000. and once or twice $300,000. I do not think we ever made any loans at $400,000. • • •

• • • [159R] • • •

We advertise our institutions in the daily press for the purpose of increasing the volume of business.

Testimony of F. W. Robinson

[161R] I am secretary of The Equity Savings & Loan Company of Cleveland, Ohio. • • •

• • • [165R] • • •

As to our loans, while they are amortized loans these people often do come in and pay them off ahead of time; we give them the privilege of paying the loan at any time after a year, that is right in the note and mortgage. As to the average length of time that our loans run, if it was not for the banks they would run quite a time, but they take so many of them off they do not get very old. We make some construction loans and when we get them in nice shape they offer them some inducement and away they go. The bank sends us a check paying our loan off and takes the mortgage over. They no doubt take a new mortgage. • • •

Testimony of H. C. Gockenbach

[182R] • • • I am secretary of The Dollar Building and Loan Company of Columbus, • • •. [183R] • • •

We have solicited the deposit of funds through advertisements in the daily papers to build our business up. We circularize to a certain extent. In one of our letters, we say, "Look over your checking account and if it is more than your immediate needs, why not open a five per cent saving account with us?" • • •

Testimony of James M. McKay

[187R] • • • I am president of The Home Savings and Loan Company, Youngstown, • • •.

• • • The borrowing stockholder is only required to pay a nominal amount so as to keep the account open. A great many pay $1.00, some pay $5.00, some pay $10.00, and some pay $100.00. • • •

• • • [191R] • • •

The item "Real Estate, office building $1,288,000.00" represents the building that our association occupies. We operate a safety deposit department. We have around 50,000 depositors. • • •

• • •

• • • We have Christmas Clubs. • • •

Testimony of Daniel C. Funk

[194R] • • • I am attorney for The Wayne Building and Loan Company of Wooster • • • [196R] • • • I think we have some money from more than two-thirds of the states

in the Union and from some foreign countries. * * * There are four building and loan companies in the country, three being of large size, * * *

Testimony of A. G. Welsh

[201R] I am secretary of The Federal Savings and Loan Company of Youngstown, Ohio, * * *.

[202R] * * * One share is the minimum amount that a borrower must hold. The par value is $100.00. He must pay $2.00 upon that share to qualify as a borrower. He is not required to keep up the installments. * * *

We take deposits from any one who wishes to make a deposit. * * *.

* * * [204R] * * *

The booklet which contains our financial statement of June 1, 1927 is a part of our advertising material and is distributed by our association. The following statement appears on page 4 of that booklet: "In fact more and more people are investing their money in a savings account or certificates of deposit at five and one-half per cent interest in preference to buying securities because an account with this Company not only affords the absolute safety desired by the investor but also provides a substantial income and at the same time has the money available at the time it is needed."

Testimony of George A. Archer

[216R] I am president of The Commercial National Bank of Columbus, Ohio. * * *

• • • [217R] • • •

Our bank advertises for deposits in the newspapers and folders and the usual bank advertising. We have our list that we usually follow up each month, mailing list. The building and loan associations advertise similarly. • • •

• • •

[218R] • • • We do make loans on real estate mortgages made directly to our bank; also on real estate mortgages when presented to our bank as collateral security by the holders of the same. We make loans on the faith and credit of real estate as disclosed in the financial statements of borrowers from whom no specific mortgages are taken. As to the percentage of such loans, most of our loans, where we get a property statement, are backed by real estate principally. Our loans are made on the faith and credit of this real estate.

• • • [219R] • • •

The building associations receive deposits and make loans. They pay a much higher rate of interest, which makes it nearly impossible for us to do anything in our savings department. The fact that the national banks are required to pay taxes has a certain bearing upon the rate of interest which those banks can afford to pay upon savings. • • •

Testimony of Charles H. Mylander on recall

• • • [230R] • • •

• • • If a man had a home that was worth $10,000. and he wanted to borrow $5,000. on it to use in his business,

he could go to a bank or he could go to a building and loan association or to a mortgage company, either one. The [231R] volume of transactions of that character made by national banks has always been large in rural districts. It is growing larger each year in the cities. * * *

Testimony of G. W. Crossen

[244R] * * * I have been employed by the Fairfield National Bank. * * * [245R] * * * The banks in my district all had a right to hold real estate mortgage loans * * * They could take loans on improved farm land for a period of five years, loans on city property for a period of one year up until this new law was enacted or the amendment to the Federal Reserve Act, then they could make a loan on improved city property for five years. * * * With reference to the one year loans on city property * * *, some of the banks had what they call a renewal clause in their mortgage which permitted them to renew the mortgage at the end of that year, * * * [355R-336R]

EXHIBIT 30.

American Loan & Savings Association.
American Savings Building—Main at Third.
Dayton, Ohio.

July 20, 1927.

Dear Sir:

As an officer of your association, we thought you might be interested in the opportunity this association offers for

the investment at good interest of your temporarily idle funds, or of funds which you would like to put where they will be quickly accessible in case of emergency.

We have a number of associations scattered over the State which use this association in this way, for their accommodation and ours. It is a favor to us for while our deposits are increasing more rapidly than those of any other of Dayton's twenty good associations, we have been able to readily place on first mortgages in this County, all of our available funds—and all at 7% interest.

Because we carry many large deposits of this kind, from other associations, banks and private individuals and firms —ranging in amount up as high as a quarter of a million dollars—we aim to keep ourselves prepared, at all times, to meet all withdrawals on demand, and without notice, however large the amount or whatever the prevailing conditions.

We carry accounts with Dayton's two largest banks, with one of which I am connected as a director and also with one of New York's largest banks. We always carry large balances and with the assistance of these banks, we believe we can meet any emergency.

While our usual rate on Temporary Certificates is 5%, we have been allowing other associations 6% on these certificates. While we cannot, of course, guarantee the continuance of this rate in the future, we will maintain it as long as we can loan our money at 7%.

If you would like to have some of your reserve where you can get it quickly and where it will earn good interest in the meanwhile, we shall be glad to receive it. We loaned Five Million Dollars in the first half of this year, and

believe we can make ready use of more money. Our total receipts in the six months were over Eleven Million Dollars.

Very truly yours,

F. M. Compton,
President and Manager.

FMC:JMcKJ

ADDENDUM B

Pertinent Provisions of Taxing Statutes

INTANGIBLES TAX ACT

[Act No. 301, Mich. Pub. Acts 1939,
as amended by Act No. 9, Mich. Pub. Acts 1953]

[Mich. Comp. Laws § 205.131, et seq.;
Mich. Stat. Ann (Henderson) § 7.556(1), et seq.].

• • •

Sec. 2. (a) For the calendar year 1952, and for each year thereafter or portion thereof there is hereby levied upon each resident or non-resident owner of intangible personal property not hereinafter exempted having a situs within this state, and there shall be collected from such owner an annual specific tax on the privilege of ownership of each item of such property owned by him. Regardless of situs, the ownership of shares of stock in banks, trust companies and national banking associations shall be taxed as provided in section 5219 of the revised statutes of the

United States with respect to shares of stock in national banking associations. Except as hereinafter provided the tax on income producing intangible personal property shall be 3½ per cent of the income but in no event less than 1/10 of 1 per cent of the face or par value of each item (or in the case of corporate stock or other evidence of corporate ownership having no par or face value, of the average per share contribution to capital, surplus and other funds in consideration of which all of the then outstanding shares of stock of the same class of such corporation shall have been issued): Provided, That income producing accounts and notes receivable owned by any taxpayer doing business at retail, arising out of the sale of goods and services at retail by such taxpayer, and with respect to which the income does not exceed the cost of carrying such receivables, shall be deemed to be non-income producing accounts and notes receivable. Except as hereinafter provided the tax on non-income producing intangible personal property shall be 1/10 of 1 per cent of said face, par or contributed value. The tax on moneys on hand or in transit or on deposit in a bank shall be 1/25 of 1 per cent of the face value thereof and the tax on shares of stock in building and loan or savings and loan associations shall be 1/25 of 1 per cent of the paid-in value of such shares.

(b) The tax on that portion of income producing accounts and notes receivable offset by the deduction of accounts and notes payable in accordance with section 3 of this act shall be 1/25 of 1 per cent of the amount of the total income producing receivables so offset.

• • •

(e). Intangible personal property subject to tax under this act or expressly exempt from the tax hereunder shall

be exempt from all general property taxes under the laws of this state.

Sec. 2a. For the calendar year 1952, in lieu of the tax imposed by this section prior to this amendatory act, and for each year thereafter, or a portion thereof, there is hereby levied upon each resident or nonresident owner of shares of stock of national banking associations located in this state and banks and trust companies organized under the laws of this state, and there shall be collected from each such owner an annual specific tax on the privilege of ownership of each such share of stock, whether or not it is income producing, equal in the case of a share of common stock to 5½ mills upon each dollar of the capital account of such association, bank or trust company represented by such share, and equal in the case of a share of preferred stock to 5½ mills upon the par value of such share. "Capital account" as referred to herein shall be determined by adding the common capital, surplus and undivided profits accounts exactly as they appear on the report as of the latest date during the year for which the tax is imposed prepared by such association, bank or trust company for the public authority having general regulatory supervision over it, and the dollar amount of the capital account represented by each share of its common stock shall be determined by dividing such capital account by the number of shares of such common stock outstanding at the date of such report. The tax on such shares of stock levied under this section shall be the only tax levied with respect to shares of such associations, banks or trust companies.

The tax imposed by the provisions of this section 2a for the calendar year 1952 shall be due and payable on or before 45 days after the effective date of this section 2a

and that so imposed for each year thereafter shall be due and payable as provided for in section 4 of this act.

Notwithstanding anything to the contrary contained in any other provision of this act, the amount of all taxes paid by any such association, bank or trust company on behalf of its shareholders for the calendar year 1952 in accordance with any provision or provisions of this act in effect prior to the effective date of this section 2a shall be credited as a payment against the tax imposed on the shares of such association, bank or trust company for the calendar year 1952 under this section 2a.

Sec. 3: • • •

(b) The following shall be exempt from the tax imposed by this act:

(1) Mortgages and land contracts and the evidences of indebtedness secured thereby upon which the specific tax imposed by Act No. 91 of the Public Acts of 1911, as amended, being sections 3640 to 3649, inclusive, of the Compiled Laws of 1929, has been paid prior to the effective date of this act; or any debt or obligation which is secured by a mortgage upon such real estate as may be owned and occupied by library, armory, benevolent, charitable, educational and scientific institutions, incorporated under the laws of this state, with the buildings and other property thereon, while occupied by them solely for the purposes for which they were incorporated or secured by a mortgage upon any house of public worship with the land on which it stands, the furniture therein, or any parsonage owned by any regularly organized religious society of this state and occupied as such;

• • •

(3) Bonds or other similar obligations of the state of Michigan, or of any political subdivision thereof;

(4) Obligations of the United States, or guaranteed as to principal or interest by the United States, which are exempt from taxation by reason of act of congress. The term "United States" shall be construed to mean and include any possessions, agencies or instrumentalities of the United States;

(5) Bonds, mortgages and other certificates of indebtedness made and issued by any municipality, organization or private individual for the purpose of erecting armories in this state;

(6) Intangible personal property belonging to benevolent, charitable, religious, educational, and non-profit scientific institutions incorporated under the laws of this state: Provided, That such exemption shall not apply to secret or fraternal societies; but the intangible personal property of charitable homes of such societies shall be exempt;

• • •

(8) Pensions, including so-called "annuities" payable under old age, retirement or pension provisions of any public authority or private employer, irrespective of the source of contributions thereto: Provided, That said public authority or private employer shall have contributed 50 per cent or more of the cost of such old age, retirement or pension program; all intangible personal property comprising all or any part of the assets of stock bonus, pension or profit-sharing plans or trusts which qualify for exemption from federal income taxes under the internal revenue code; cash surrender values and loan values of insurance policies; annuities prior to the time when the

periodic payments thereunder shall actually commence, and royalties;

(9) Intangible personal property belonging to foreign insurance companies paying the specific tax under section 17 of chapter 2 of part 2 of Act No. 256 of the Public Acts of 1917, being section 512.17 of the Compiled Laws of 1948, as amended, annuity companies which provide a reserve to retire their certificates at, or prior to the time of maturity and domestic insurance companies, exempt or taxable under the provisions of Act No. 206 of the Public Acts of 1893, as last amended, being sections 211.1 to 211.157, inclusive, of the Compiled Laws of 1948;

• • •

(11) Intangible personal property belonging to banks, building and loan associations, savings and loan associations and trust companies doing business in this state under whatever authority organized;

• • •

(12a) Intangible personal property belonging to credit unions doing business in this state under whatever authority organized;

• • •

Sec. 3a. Notwithstanding any provision of this act to the contrary, the owner of a claim for money on deposit with a bank of any kind or savings in a building and loan and savings and loan association, engaged in the business of receiving moneys for deposit or savings subject to withdrawal by check or otherwise, shall be exempt from the tax imposed by this act on the ownership of such claim during

any calendar year in the event that such bank or building and loan or savings and loan association voluntarily elects, as hereinafter provided, to pay, in the manner provided for in this act, a tax for such year of 1/25 of 1 per cent of that amount of the face value of its assets as is equal to the amount of its total deposit liabilities, or in the case of building and loan or savings and loan associations the amount of its share liabilities, as of the close of business on December 31 of such year less the amount of all its deposit liabilities or share liabilities, as the case may be, on that date owing to the federal government or any agency or instrumentality thereof and to the state of Michigan and any political subdivision, instrumentality, and agency thereof. Any bank or association which elects to pay a tax as aforesaid for any year shall, on or before December 31 of each year commencing in 1945, file a written declaration of its voluntary election to do so with the department of revenue. The payment of such tax for any year by a bank or building and loan or savings and loan association shall not exempt it from liability for and payment of any other taxes validly imposed upon it under any other statute or statutes of this state.

• • •

Sec. 6. • • •

Any person engaged in the business of receiving moneys for deposit or savings subject to check or other withdrawal, who collects and pays the tax imposed upon the owner thereof under this act as required by this section but does not assume the payment thereof, shall be entitled to retain for the total amount of the taxes so collected by him for each year a sum of money equal to 3 per cent thereof as compensation for services rendered in acting as the agent of the department in collecting and paying

such tax. The tax on shares of stock of state and national banks and trust companies located in Michigan shall be paid by said bank or trust company on behalf of its shareholders and the tax so paid may be charged against the shareholders for whom the tax was paid. • • •

• • •

GENERAL CORPORATION LAWS

[Act No. 85, Mich. Pub. Acts 1921],
as amended by Act No. 183, Mich. Pub. Acts 1952]

[Mich. Comp. Laws § 450.301, et seq.;
Mich. Stat. Ann. (Henderson) § 21.201, et seq.]

• • •

Sec. 3. Every cooperative association and every domestic corporation hereafter organized for profit, and every foreign corporation for profit hereafter applying for admission to do business within this state, shall at the time of filing its articles or applying for admission, as the case may be, pay to the Michigan corporation and securities commission, as an organization fee and for the privilege of exercising its franchises within this state, a sum equal to ½ mill upon the dollar for each dollar of the authorized capital stock of such corporation: Provided, That in case of a foreign corporation, such fee shall be computed upon that portion of its authorized capital stock represented by the portion of its property, both tangible and intangible, owned and/or used or to be used and business transacted in Michigan: And provided further, That in no case either as to a domestic or foreign corporation shall the organiza-

tion fee be less than $25.00: And provided further, That every corporation heretofore or hereafter incorporated under the laws of the state of Michigan which shall thereafter increase its authorized capital stock, and every foreign corporation heretofore or hereafter admitted to do business in this state, which shall thereafter increase its authorized capital stock, shall pay a sum equal to ½ mill upon each dollar for each and any increase in its authorized capital stock: And provided further, That in case of a foreign corporation, such fee shall be computed upon that portion of its authorized capital stock represented by the portion of its property, both tangible and intangible, owned and/or used or to be used and business transacted in Michigan: And provided further, That whenever a foreign corporation which has heretofore or hereafter been admitted to do business in Michigan shall increase the proportion of its authorized capital stock represented by property owned and/or used and business transacted in this state, it shall pay a sum equal to ½ mill upon each dollar of the increased proportion of its authorized capital stock represented by its property, both tangible and intangible, owned and/or used and business transacted in Michigan: And provided further, That in determining the amount or value of intangible property, including capital investments, owned or used in this state by a foreign corporation, such property shall be considered to be located, owned or used in this state for the purposes hereof, if used in or acquired from the conduct of its business in this state, irrespective of the domicile of the corporation. The Michigan corporation and securities commission shall in all such cases be authorized to require the corporation to furnish detailed and exact information touching such several matters before making a final determination of the organization fee to be paid by such corporation: Provided, That the Michigan corporation and securities commission

in determining the organization fee under this section shall work in conjunction with the state department of revenue: And provided furtlier, That the rate of fees herein provided for, when applied to corporations organized under Act No. 50 of the Public Acts of 1887, as amended, being sections 489.1 to 489.40, inclusive, of the Compiled Laws of 1948, and generally known as "building and loan associations", shall be 1/10 mill. The term "corporation" as used in this act shall be deemed to include partnership associations, limited, cooperative associations, all joint associations having any of the powers of corporations, and such common law trusts or trusts created by statute of this or any other state or country exercising common law powers in the nature of corporations, whether domestic or foreign, in addition to such other corporations as are referred to in this act. All corporations whose terms of corporate existence shall have expired, or shall be about to expire by limitation, and who shall seek to extend or renew such corporate existence, in accordance with law, shall be regarded as new corporations for the purpose of the payment of the fees provided by this act, and shall be required to pay such fees before the extension or renewal of such corporate existence.

• • •

Sec. 4. Every cooperative association and every profit corporation organized or doing business under the laws of this state, or having the privilege to do business, employing capital or persons, owning or managing property or maintaining an office, or engaging in any transaction, in this state, excepting domestic and foreign insurance companies, medical care corporations, hospital service corporations, state and national banking corporations, trust companies, and such corporations now in existence or hereinafter incorporated formed with the consent of the banking

commissioner for the state of Michigan for the purpose of taking over all or a part of the assets of closed banks or trust companies with the intent and purpose of liquidating such assets when and as conditions warrant such action by said corporations, shall pay, at the time of filing the annual report with the Michigan corporation and securities commission, as required by sections 81 and 82 of Act No. 327 of the Public Acts of 1931, being sections 450.81 and 450.82 of the Compiled Laws of 1948, an annual fee of 4 mills upon each dollar of its paid-up capital and surplus, but such franchise fee shall in no case be less than $10.00: Provided, That operating railroad, interurban railroad, telephone, telegraph and express companies heretofore exempt from this franchise tax shall be exempt as to the franchise tax payable in 1953 and thereafter unless the state board of assessors has certified prior thereto to the Michigan corporation and securities commission that the specific tax rate under Act No. 282 of the Public Acts of 1905, as amended, being sections 207.1 to 207.21, inclusive, of the Compiled Laws of 1948, has been based upon state equalized valuation. It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporate franchises within this state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period. The Michigan corporation and securities commission shall in all such cases be authorized to require the corporation to furnish detailed and exact information touching such several matters before making a final determination of the privilege fee to be paid by such corporation. For the purpose of this act only, each share of no par value shall be deemed to have the value of at least $1.00, or such value as shall have been fixed by the corporation for the sale of such stock, or the book value as determined by the Michigan corporation and

securities commission, whichever may be the higher. In any case where the capital of a corporation is not divided into shares, the whole property thereof shall be deemed to be the authorized capital stock for the purposes of this act.

The term "surplus", as used in this act, shall be taken and deemed to mean the net value of the corporation's property, less its outstanding indebtedness and paid-up capital; but in no case, either as to domestic or as to foreign corporations, shall any deduction be made from the item of paid-up capital, in computing the franchise fee thereon, by reason of any impairment of the same.

Sec. 4a. Every building and loan association organized or doing business under the laws of this state shall at the time of filing its annual report as required by section 5 of chapter 2 of part 5 of Act No. 84 of the Public Acts of 1921, for the privilege of exercising its franchise and of transacting its business within this state, pay to the secretary of state an annual fee of ¼ mill upon each dollar of its paid-in capital and legal reserve.

Sec. 4b. Every cooperative association and every profit corporation organized or doing business under the laws of this state, having the privilege to do business, employing capital or persons, owning or managing property or maintaining an office, or engaging in any transaction in this state, principally engaged in the development of mines and mining of iron, copper, silver and other mineral ores within this state, shall at the time of filing its annual report with the Michigan corporation and securities commission, as required by sections 81 and 82 of Act No. 327 of the Public Acts of 1931, being sections 450.81 and 450.82 of the Compiled Laws of 1948, pay an annual fee of 4 mills upon each dollar of the fair average value of its issued capital stock for the preceding year ending June

30th. In estimating the value of capital stock, the surplus and undivided profits shall be included but such fee shall in no case be less than $10.00.

Sec. 5. In the case of computing the annual franchise fee prescribed by section 4 of this act, both as to domestic and foreign corporations, such computations shall be made by the Michigan corporation and securities commission, working in conjunction with the state department of revenue, upon the entire paid-up capital and surplus of any corporation which does not maintain a regular place of business outside this state other than a statutory office.

Sec. 5d. Any corporation at least 90 per cent of whose assets consist of intangible personal property or at least 90 per cent of whose gross income consists of interest and dividends, gross profits from trading in intangible personal property, or commissions or other compensation for financial services, shall be deemed for the purposes of this act to be engaged in financial business. The annual franchise fee of any such corporation shall be measured by that portion of its paid-up capital and surplus as its gross business in this state is to its gross business everywhere during the period covered by its report determined as the sum of:

(1) Fees, commissions or other compensation for financial services rendered within this state;

(2) Gross profits from trading in stocks, bonds or other securities managed within this state;

(3) Interest and dividends received within this state;

(4) Interest charged to customers, at places of business maintained within this state, for carrying debit

balances of margin accounts, without deduction of any costs incurred in carrying such accounts; and

(5) Any other gross income resulting from the operation of financial business within this state; divided by the aggregate amount of such items of the taxpayer everywhere.

Sec. 5e. If it shall appear on the application of the taxpayer or otherwise that an allocation factor determined pursuant to this act does not properly reflect the activity, business, receipts and capital of a taxpayer reasonably attributable to the state, the commission shall adjust it by:

(1) Excluding 1 or more of the factors or any component thereof;

(2) Including 1 or more other factors, such as expenses, purchases, contract values (minus subcontract values);

(3) Excluding proportionately 1 or more asset items in computing entire paid-up capital and surplus; or

(4) Applying any other similar method calculated to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to this state.

The commission shall promptly publish its rulings with respect to any application of the provisions of this section. Such rulings shall be promulgated in conjunction with the state department of revenue.

• • •

APPELLANT'S BRIEF

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1960

No. 155

MICHIGAN NATIONAL BANK, a banking association organized under the laws of the United States,

Appellant,

NATIONAL BANK OF WYANDOTTE, THE FIRST NATIONAL BANK (THREE RIVERS, MICHIGAN), COMMERCIAL NATIONAL BANK OF IRON MOUNTAIN, THE NATIONAL BANK OF JACKSON, and THE FIRST NATIONAL BANK AND TRUST COMPANY OF KALAMAZOO, banking associations organized under the laws of the United States,

Intervening Plaintiffs,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN, and LOUIS M. NIMS, STATE COMMISSIONER OF REVENUE,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

Statement and Brief of Appellant, Michigan National Bank, re Appellee's Objections to Motion of Sixty-Eight Banks in Michigan for Leave to File a Brief as Amici Curiae and Brief Amici Curiae

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1960

No. 155

MICHIGAN NATIONAL BANK, a banking association organized under the laws of the United States,

Appellant,

NATIONAL BANK OF WYANDOTTE, THE FIRST NATIONAL BANK (THREE RIVERS, MICHIGAN), COMMERCIAL NATIONAL BANK OF IRON MOUNTAIN, THE NATIONAL BANK OF JACKSON, and THE FIRST NATIONAL BANK AND TRUST COMPANY OF KALAMAZOO, banking associations organized under the laws of the United States,

Intervening Plaintiffs,

vs.

STATE OF MICHIGAN, DEPARTMENT OF REVENUE OF THE STATE OF MICHIGAN, and LOUIS M. NIMS, STATE COMMISSIONER OF REVENUE,

Appellees.

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Statement and Brief of Appellant, Michigan National Bank, re Appellee's Objections to Motion of Sixty-Eight Banks in Michigan for Leave to File a Brief as Amici Curiae and Brief Amici Curiae

Appellee, in its Objections (p. 5), erroneously asserts that "the participation of the sixty-eight banks as amici curiae has been directly solicited by the Michigan National Bank . . in an attempt to mislead this Court into believing that the position taken by the Michigan Bankers Association as expressed in paragraph 1 above is not representative of the Michigan banks."

To the contrary Appellee is attempting "to mislead the Court into believing that the position taken by the Michigan Bankers Association" tax and executive committees represents the position of the banks in Michigan — notwithstanding

(a) the action taken by these committees in 1953-4 was never voted upon nor authorized by the members of the Association,

(b) members were not advised of the position taken by these committees until 1959—(five to six years thereafter),

(c) The officers refused to submit the matter to the vote of the membership at the annual meeting of 1959, although requested by appellant so to do, and

(d) over sixty banks, in their motion to file a brief amici, state that their position is directly contrary to that asserted by these committees of the Michigan Bankers Association.

In 1952, the Michigan Legislature imposed a tax upon banks which it concluded was unconstitutional as to national banks. (Appellee's Objections, p. 9, par. 1.)

Among other taxes then considered was the imposition of a special income tax on banks (Appellee's Objections, p. 20-1). The Tax Committee of the Michigan Bankers Association—without consulting with or obtaining approval of its members—deemed the amendment to the Intangibles Tax Law (Act 9 of 1953) to be "more desirable in form than a special tax on income." (Appellee's Objections, p. 20.)

Accordingly, this committee made an "agreement" with the legislative committee, that Act 9 would be enacted, "on the assurance of the Association that we [it] would help the State defend any attack on the legality of the tax (Appellee's Objections, p. 15) . . . if the validity of the new tax was

questioned by any national bank[1] . . ." (Appellee's Objections, p. 20.)

Members of the Association were not apprised of this "agreement" until 1959. (Appellee's Objections, p. 14.)

Appellant (and five intervenor national banks), contending that Act 9 was contrary to R. S. 5219, instituted the present action on December 7, 1953. The Executive Committee of the Association, carrying out the "agreement" of the tax committee, directed the appearance amicus of the Association on the side of the State before the trial court. (Appellee's Objections, pp. 10-11.)

It was not disclosed to the trial court, to appellant or to the members of the Association at that time that this appearance and the brief amicus subsequently filed were pursuant to the above "agreement." The Association counsel filed a brief amicus in the trial court, which brief did not state that it was on behalf of the members of the Association. The trial court, however, without any proof in the record (and there is none in fact), erroneously concluded that this brief was filed on behalf of the members and so stated, which statement was quoted in the opinion of the Michigan Supreme Court.

After the trial court decision, in view of the statement therein that the brief of the Association stated the position of the members, Appellant sought to have presented to the full membership of the Association for a vote the question of whether or not the position taken in the brief amicus

[1] The validity of Act 9 as to national banks apparently was in doubt in the minds of the Michigan Legislature at the very time of its enactment.

Certainly, a committee of the Bankers Association cannot bargain away important safeguards prohibiting tax discrimination by a state against national banks guaranteed by Congress under R.S. 5219.

before the trial court met with the approval or disapproval of the membership and correctly or incorrectly stated the position of the members.

Appellant's letter requesting an opportunity to be heard on this subject was delivered to the proper officers of the Association the day preceding the opening session of the June 19, 1959, annual meeting at Mackinac Island. Appellant was told by one of the officers that if such a request were made, Appellant would have a hearing before the full membership. Notwithstanding, the meeting was adjourned without recognizing Appellant and it was denied the opportunity to present its views to the full membership meeting on this subject which it deemed vital to all banks. (Stoddard affidavit attached hereto.)

Only thereafter, on July 2, 1959, for the first time did the Executive Manager of the Association "lay before the membership the . . . Association's position relative to the Intangibles Tax"—after its filing the brief amicus and the lower court's comment thereupon were accomplished facts. (Appellee's Objections, p. 14)

In this same bulletin the Association stated that "we feel that we had an obligation to the Michigan State Legislature (Appellee's Objections, p. 16) and (omitted from Appellee's Objections) further stated that "No one claims that the share tax is perfect . . . but it is to be preferred to an income tax."[2] (See Stoddard affidavit attached)

Appellant contacted banks located in the vicinity of the cities in which it operated endeavoring to ascertain their position, i. e., whether or not they agreed with, approved or authorized the position stated in the brief amicus filed in

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[2]This bulletin of the Association recognized that "We appreciate that savings and loan associations are stiff competition, some of which may be due to favored tax treatment . . . " (Appellee's Objections, p. 16).

the court below by the committee of the Association on Act 9. When Appellant was told that the Association's position and the lower court's statement in respect thereto were not in accord with the position of a bank, Appellant, knowing that the Community National Bank of Pontiac[3] and other banks in Michigan (with whom Commmunity National was consulting) intended to ask leave to file a brief amicus correcting the misstatement of the court below, stated that such bank had the opportunity to join with Community National and other banks to present their position to this Court. Most of the banks contacted did join in the application of the Community National bank and other banks for leave to file a brief amicus. (See Stoddard affidavit attached.)

From the foregoing it is clear that the membership of the Association never approved the statement of position contained in the brief amicus of the committee of the Association, and the comment of the lower court so stating is erroneous—and there is nothing in the record nor in Appellee's Objections which supports or permits of any other conclusion. Over sixty banks in Michigan in their motion to file a brief amicus expressly state that such position is directly contrary to their position.[4]

Respectfully submitted,

Thomas G. Long

Victor W. Klein

Philip T. Van Zile, II

Harold A. Ruemenapp

Attorneys for Appellant

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[3]Community National Bank of Pontiac had contested the validity of Act 9 since its adoption in 1953.

[4]The position of most of the other members of the Michigan Bankers Association has not been sought nor indicated.

Affidavit of H. J. Stoddard, President of Michigan National Bank, Appellant.

State of Michigan }
} ss.
County of Wayne }

H. J. Stoddard, being first duly sworn, deposes and says that:

(1) He is and for approximately 20 years has been President of Appellant Michigan National Bank.

(2) Michigan National Bank has been a member of the Michigan Bankers Association for approximately 20 years.

(3) As a member of said Association, Michigan National Bank was not consulted about nor did it authorize or approve the Association tax committee's position before the Michigan Legislature in respect to the adoption of Act 9 of P.A. of 1953, or as to any "assurance of the Association that . . .[it] would help the State defend any attack on the legality of the tax if the validity of the new tax was questioned by any national bank"—nor if consulted would have approved of waiving its right to the safeguards assured to national banks under R.S. 5219 against tax discrimination by the State favoring other moneyed capital invested in savings and loan associations competing with the business of national banks.

(4) Neither Michigan National Bank, as a member of the Association, until November 19, 1958, nor the membership as a whole until mid 1959 was apprised of the position taken by the tax or executive committee of the Association in respect to the Intangibles Tax, Act 9, or as set forth in the brief amicus filed by the Association in the trial court. The view therein expressed is contrary to Appellant's position, and affiant believes contrary to the position of most banks in the Association.

(5) When the trial court inferred that the Association brief expressed the views of the membership—rather than of a small committee of the Association—affiant, on behalf of Michigan National Bank, by letter dated June 8, 1959, directed to the presidents of all banks in Michigan, criticized the position taken by the Michigan Bankers Association in its brief amicus so that this would be before the membership when appellant expected to present the subject at the annual meeting on June 19 or 20, 1959.

The following written response directed to the Michigan Bankers Association, with copy to affiant and others, indicates that the position of the members was "at variance" with that stated by the committee of the Association in respect to Act 9:

THE FIRST NATIONAL BANK
Burr Oak, Michigan

June 15, 1959

Mr. Ralph M. Stickle, Executive Manager
Michigan Bankers Association
1502 Bank of Lansing Building
Lansing, Michigan

Subject: TAXES

Dear Ralph:

We are in receipt of a letter from Howard J. Stoddard, President of Michigan National Bank, advising in great detail of the disparity between the taxes paid by Banks and Savings & Loan Associations.

Mr. Stoddard is using a report prepared by the Michigan State Banking Department to show the present inequalities and this report further emphasizes the point that the present tax would increase the burden of Banks and decreases that of the Association; thereby granting them further competitive advantages.

The writer is quite aware of all of this from the many talks and papers presented at the various bank meetings. At all of those meetings the bankers were overwhelmingly in favor of equitable tax treatment.

What I do not understand is the reason for the resolution passed by our association, as quoted in Mr. Stoddard's letter, to the effect the association felt the present plan of taxation of Banks and Savings & Loans was eminently fair. This would appear to be at variance with everything the writer has ever heard or read on the subject at bank meetings or from bank publications.

The writer further understands that many of the larger banks have interlocking directors with the Savings and Loan Associations or else receive very substantial deposits from them and that these men fail to see anything wrong with the inequitable situation because of selfish monetary reasons. As a matter of principle, if any of these men are on the committees for the Michigan Bankers Association, they should stand up and be counted and disqualify themselves from voting or taking part in any discussion or matter where they serve two masters.

The writer would like to hear the Association's side of this story and perhaps it is worth covering at the forthcoming meeting, but in any event, we sincerely hope your office will unceasingly and vigorously fight for a more equitable tax treatment for your members.

With kind personal regards, I am

Sincerely,

J. E. Hickory, President

cc: H. J. Stoddard
Carlton H. Morris
Floyd E. Wagner

(6) Thereafter, on June 17, 1959, affiant, on behalf of Michigan National Bank, as a member, by letter directed to E. Davidson Potter, Vice President of the Michigan Bankers Association, and the incoming president who would preside at the annual meeting, submitted a resolution on the subject and requested the opportunity to present the same at the annual meeting of members on June 19 or 20, 1959, to ascertain by a vote of the members whether in effect the statement of the Association in the brief amicus was authorized and whether it was in accord with or contrary to the position of the members.

(7) Affiant was told that the letter had been received, that it was before the Executive Committee of the Association the day before the meeting, and that if affiant requested an opportunity to be heard at the meeting, he would be afforded such opportunity. Notwithstanding, on the last day of the meeting, when new business was to be considered, affiant, in the front row, sought recognition to discuss the question, but the presiding officer did not recognize him and hastily adjourned the meeting without affording the membership an opportunity to discuss and vote upon the question.

(8) Affiant, being advised by Community National Bank, that it and other banks it had consulted and was consulting, intended to file a motion for leave to file a brief amicus in this appeal, was told that any other banks in Michigan, so minded, would be welcome to join. Appellant endeavored to ascertain the position of other banks in the vicinity of the offices of appellant, i. e., whether or not they agreed with, approved or authorized the position stated in the brief amicus filed in the court below by the committee of the Association on Act 9. When Appellant was told that the Association's position and the lower court's statement in respect thereto were not in accord with the position of a bank, Appellant stated that such bank had the opportunity to join with Community National and other banks to present

their position to this Court correcting the misstatement of the court below. Most of the banks contacted did join in the application of the Community National Bank and other banks for leave to file a brief amicus.

(9) As a member of the Association, Michigan National Bank received a bulletin from the office of the Executive Manager of the Michigan Bankers Association dated July 2, 1959, quoted in part at length in appellee's objections, pages 14-18, which bulletin, among other things, stated that "no one claims that the share tax is perfect . . . but it is to be preferred to an income tax," which statement was omitted from the above Exhibit set forth in appellee's objections.

/s/ H. J. Stoddard

H. J. Stoddard

Subscribed and sworn to before me this
15th day of December, 1960.

/s/ Beatrice Cabanaw

Beatrice Cabanaw, Notary Public,
Wayne County, Michigan.
My commission expires February 7, 1961.